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No.

In the
Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a privately owned Korean company, which is subject to suit in Korea, is entitled to immunity in this country as an "organ of a foreign state," under the Foreign Sovereign Immunities Act, where that term is not defined in 28 U.S.C. § 1603(b)(2) and has never been construed by this Court.[1]

Whether an American company, which was defrauded out of $27 million, is entitled to a hearing to resolve conflicting facts and law relating to whether a Korean company, which maintained offices in New York City, engaged in commercial activity in the United States?

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[1] The Solicitor General has recommended that certiorari be granted from the Ninth Circuit's decision in *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85 (distributed for conference of December 7, 2006), involving the same issue because of a conflict among the circuits on this "important, recurring, and sensitive" question.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, AK Capital LLC is a limited liability company organized under the laws of the State of Delaware. It has no parent company or subsidiaries, and there are no publicly held companies that own 10% or more of the corporation's stock.

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INTRODUCTION

When this case began in the depths of Manhattan on October 13, 2000, no one realized, at the time, it would spawn an issue of national importance that would ultimately bring us to the steps of the United States Supreme Court. That issue is a recurring one involving foreign companies that commit tortious acts against American citizens, and then seek to avoid liability for their actions under the Foreign Sovereign Immunities Act. They do this by claiming they are instrumentalities of a foreign government!

Here, the Second Circuit's decision, which affirmed the dismissal of the tort action brought by an American citizen against a Korean company for a fraud involving millions of dollars, stands in stark conflict with a Ninth Circuit decision in which a petition for certiorari is also pending. *See Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85, 74 U.S.L.W. 3050 (distributed for conference of December 7, 2006). Significantly, the Solicitor General has recommended that the *Powerex* petition should be granted because the issue is an "important, recurring, and sensitive one that warrants this Court's consideration."[2]

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[2] *See* Solicitor General's Brief as Amicus Curiae at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006).

The decision below also conflicts with the spirit of *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which warned against the dangers inherent in the expansion of the Foreign Sovereign Immunities Act. Such an enlargement places American citizens at risk to damage by foreign companies that need not worry about redemption because of a belief that they can take refuge in the FSIA.

Today, the growing ascendancy of foreign companies flooding our country[3] is a matter of considerable concern because of their ability to avoid suits in our federal courts under the Foreign Sovereign Immunity Act as an "instrumentality" or "organ" of a foreign sovereign. Since this case and *Powerex* are in direct conflict, the clash between two major circuit courts over the standard to be used in gauging eligibility under the FSIA achieves national importance, and is bound to have profound ramifications. The stage has been set for the resolution of an issue that will affect thousands of businesses all over the world. Therefore, the Petitions in *both* this case and *Powerex* should be granted.

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[3] The Securities and Exchange Commission reported in 2003 that the number of non-American companies registered in the United States increased from 517 in 1992 to *more than 1,300* less than a decade later." *See* William Donaldson, *Restoring Faith in the Global Economy*, World Leadership Forum, available at *http://www.fpa.org* (Sept. 25, 2003). Obviously, this is symptomatic of a rapidly expanding global economy. Thus, the number of suits between foreign companies and American citizens will continue to increase exponentially.

OPINIONS AND ORDERS BELOW

Petitioner Jack Murphy, an American citizen, commenced a shareholders' derivative action in the New York Courts against Korea Asset Management Corporation ("KAMCO") and AK Capital LLC. The suit sought to recover damages resulting from KAMCO's false representations made to induce AK Capital to submit a non-refundable *$27 million* Earnest Money Deposit for the purchase of a Korean steel company. KAMCO removed the action to federal court and then sought to dismiss Murphy's complaint, arguing that it was entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA").

On October 19, 2005, Judge Richard J. Holwell, of the Southern District of New York, issued a decision granting KAMCO's motion to dismiss. *Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627 (S.D.N.Y. 2005). (App. 3-46). The court previously issued a short order to the same effect (App. 1).

The Second Circuit (Miner, Calabresi & Michel, JJ.)[4] affirmed the district court in an unpublished order. *Murphy v. Korea Asset Management Corp.*, No. 05-5838-cv, 2006 WL 2129701 (2d Cir. July 6, 2006). (App. 47-50). Jack Murphy's timely filed Petition for Rehearing and Suggestion of Rehearing *en Banc* was denied on August 28, 2006. (App. 51-52).

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[4] Chief Judge Paul R. Michel, of the Court of Appeals for the Federal Circuit, was sitting by designation.

JURISDICTION

The Second Circuit's order was entered on July 6, 2006. A timely Petition for Rehearing and Rehearing *en Banc* was denied on August 28, 2006. The 90-day period for filing this Petition expires on November 27, 2006. *See* Supreme Court Rule 30.1. KAMCO removed this action to federal court under 28 U.S.C. §§ 1330, 1332 and 1441. This Court's jurisdiction to review the Second Circuit's ruling is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in relevant part, that the judicial power of the United States

> shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ... between a state, or the citizens thereof, and foreign states, citizens or subjects. U.S. Const. art. III, § 2.

The Fifth Amendment guarantees that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Foreign Sovereign Immunities Act, contained in Chapter 97 of Title 28 of the United States Code entitled "Jurisdictional Immunities of Foreign States," provides, in pertinent part, as follows:

28 U.S.C. § 1603. Definitions.

For purposes of this chapter —

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

The "Findings and declaration of purpose" of the Foreign Sovereign Immunities Act, set forth in 28 U.S.C. § 1602, provides:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

28 U.S.C. § 1605, entitled "General exceptions to the jurisdictional immunity of a foreign state," provides in pertinent part that a

> foreign state shall not be immune from the jurisdiction of courts of the United States" in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

The central events that frame the issues presented by this Petition can be simply stated. Petitioner Jack Murphy is a member of AK Capital with Alex Kwon.[5] In 1998, they learned that the assets of Hanbo Iron & Steel Co., Ltd. ("Hanbo Steel"), which was going through bankruptcy proceedings, were available for sale (App. 3-4). Respondent Korea Asset Management Corporation, Hanbo Steel's principal creditor, was searching for a purchaser (A. 375; App. 4).[6] Eventually, KAMCO's representatives approached Alex Kwon about purchasing Hanbo Steel because he had access to the necessary funding and strong ties to the Korean steel industry (A. 375).

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[5] Mr. Murphy is a former United States Congressman who served with distinction in the United States Army during the Korean War (A.373). Alex Kwon, a graduate of Yale University, is the son of the founder of Union Steel Co., Ltd., a prominent steel producer in Korea (A.374; App. 15). Numbers preceded by "A." refer to pages of the Joint Appendix filed in the Second Circuit. Numbers preceded by "App." refer to the Appendix to this Petition.

[6] KAMCO, a *joint-stock corporation*, was established to "accelerate the resolution of nonperforming assets held by financial institutions, and to efficiently support the management normalization of the enterprises showing signs of insolvency" (A.311). KAMCO played a leading role in restructuring various non-performing South Korean financial institutions and businesses (A.17). Its shareholders include a group of private Korean banks (28.6%); the Korea Development Bank (28.6%); and the Korean government (42.8%). (App. 9).

Alex Kwon, Jack Murphy and key executives of KAMCO, together with their attorneys and financial advisors, *met in New York City* on October 13, 2000, to discuss the possible purchase of Hanbo Steel (A. 376).[7] Representatives of KAMCO made a number of critical misrepresentations to induce AK Capital to purchase Hanbo Steel, which required the deposit of millions of dollars as a non-refundable Earnest Money Deposit (A. 377).[8]

For instance, the Vice-Chairman of KAMCO misrepresented that they could guarantee the Korean bankruptcy court's approval of the sale, which was necessary for its completion, and falsely indicated that AK Capital would only have to deposit $10 million as earnest money (A. 377, 379). Instead, *AK Capital was forced to advance $27 million, which it subsequently lost* when the bankruptcy court refused to approve the sale.[9]

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[7] The meeting was held at the Palace Hotel in Manhattan, just a few blocks from KAMCO's New York City offices (A.375).

[8] At the time of the October 13th meeting, AK Capital was known as AK Capital B.V. (A. 553; App. 20). However, as a result of KAMCO's representations, Alex Kwon and Jack Murphy incorporated AK Capital LLC, in Delaware, "as a vehicle for the acquisition and operation of Hanbo Steel" (A.378).

[9] KAMCO also falsely asserted that it could control all decisions concerning the initial bidding process, as well as the closing of the assets purchased, and would use its best efforts to do so (A. 377, 390).

Because of these fraudulent statements, which devastated the buyers, Jack Murphy instituted a shareholders' derivative action for fraud in the New York State courts to recover the damages suffered by AK Capital. KAMCO *removed* the state action to federal court, and then moved to dismiss the Plaintiff's complaint by claiming that, under the Foreign Sovereign Immunities Act, it was an "instrumentality" of the Republic of Korea (A. 8).

Jack Murphy opposed the motion to dismiss on a number of grounds. First, KAMCO was *not* entitled to immunity under the FSIA because the Republic of Korea concededly owned less than half of KAMCO's shares (A. 298). Therefore, under *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), KAMCO did *not* qualify as an "instrumentality" of the Korean government because a majority of its shares was not directly owned by the foreign state.[10]

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[10] 28 U.S.C. § 1603(b)(2) indicates that an "instrumentality" of a foreign state means any entity which is an "*organ* of a foreign state or political subdivision thereof, or a *majority of whose shares* or other ownership interest is owned by a foreign state or political subdivision thereof" (emphasis supplied). *Dole Food* confirmed that to qualify as an "instrumentality" under this provision, the foreign state must directly own a *majority* — more than 50% — of the corporation's shares. KAMCO acknowledged that the Korean government only directly owned *42.8%* of its shares (A.298). Since this is less than a majority, the district court properly found that KAMCO, by definition, is *not* an instrumentality of the Korean government under that aspect of § 1603(b)(2). (App. 26-27).

Moreover, KAMCO, operating as a typical independent corporation with private shareholders, is engaged in commercial activity in the United States and has generated annual profits of over $19 million (App. 9-10). It has a board of directors, officers, employees and "1 trillion Korean Won of 'authorized capital'" (more than $1 billion), as well as a "paid-in capital of 140 billion Won" (nearly $150 million) (App. 9). Also, KAMCO is not required to hire public employees and the Korean government does *not* pay the salaries of KAMCO's employees (App. 34-35). Further, under Korean law, KAMCO is "*treated as a private entity and not as a government instrumentality* where a tort claim is asserted against it" (A. 366)(emphasis supplied). Moreover, as with other private concerns, *KAMCO pays taxes* (A.464).

Finally, the Republic of Korea does *not* supervise KAMCO. Rather, it is operated by a private Management Committee and a Managing Director who is *elected* by the shareholders (A. 317). In addition, at least six of the Committee's 11 members are drawn from the private sector (A. 315-16). Therefore, since any action taken by the Management Committee requires a majority vote (A. 317), the Korean government does not control KAMCO's actions.

The primacy of these ironclad facts enabled Jack Murphy to argue that KAMCO should not be able to avoid the jurisdiction of our courts over its tort action by invoking the Foreign Sovereign Immunities Act. Mr. Murphy also sought an evidentiary hearing to resolve the contested factual issues contained in the conflicting affidavits submitted in connection with KAMCO's motion to dismiss (*see, e.g.*, A.347, 573).

On September 30, 2005, a key historical event, Judge Holwell dismissed Jack Murphy's complaint, holding that KAMCO was immune from suit under the provisions of the FSIA (App. 1). A written decision was later issued on October 19, 2005 (App. 3). *See Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627 (S.D.N.Y. 2005).[11]

Judge Holwell recognized that KAMCO is a "corporation wholly owned by its shareholders" and possesses other characteristics of a traditional corporation (App. 9). He also found that KAMCO "behaves" like a "typical for-profit corporation" because it engages "distressed debt professionals" to repackage and sell non-performing loans to domestic and international investors in a variety of ways, "including by issuing asset-backed securities, conducting international auctions, or by establishing asset management corporations" (App. 9-10).

The court also noted that, in 2003, KAMCO earned profits of approximately $19 million (App. 10). Furthermore, the district judge found that KAMCO is not required to hire public employees and the Korean government does not pay its employees' salaries (App. 34). Moreover, KAMCO officials are amenable to suit in their individual capacity for certain purposes (App. 35).

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[11] Judge Holwell nominally granted Jack Murphy a hearing to provide supplementary proof on the FSIA issue, but he refused counsel the right to *examine* KAMCO's witnesses, whose declarations on the FSIA issues were disputed and which formed the central core of the court's decision (A. 582; App. 5).

Despite these findings, the court dismissed Jack Murphy's complaint because it believed that KAMCO was an organ of the Korean government. In reaching that conclusion the court indicated that "KAMCO was formed by statute and presidential decree, performs functions typically performed by the government (ensuring financial stability through the management of a public fund), has a Management Committee appointed by the government, and has many — if not most — of its operations directly supervised by the government" (App. 40).

On July 6, 2006, a panel of the Second Circuit affirmed the district court's decision, holding simply that KAMCO qualifies as an organ of the Republic of Korea for purposes of FSIA immunity for the reasons stated by the district court (App. 48-50).

REASONS FOR GRANTING CERTIORARI

I. Certiorari Review is Warranted to Resolve the Conflict between the Second and Ninth Circuits, and to Ensure that Companies, Which Are Not Considered Organs by their Own Governments, Cannot Avoid the Consequences of their Tortious Actions by Resorting to the Foreign Sovereign Immunities Act

A fundamental principle celebrated by our legal system is that American citizens, when damaged by a foreign company, are entitled to have their grievances heard in our courts.[12] And, it is simply *wrong* for a foreign company, which is treated as a *private concern* in its own country, to receive immunity under the Foreign Sovereign Immunities Act for tortious conduct because of a claim that it is an instrumentality of its government. Thus, the treacherous ambiguity of "instrumentality," under 28 U.S.C. §1603(b), lies at the heart of this heavy issue.

The most efficient analysis of this presiding issue must, of necessity, begin with the Foreign Sovereign Immunities Act, which provides, in pertinent part, that an "instrumentality of a foreign state" is protected from suit in the United States. *See* 28 U.S.C. §1603(b)(2). However, "instrumentality," under that provision, is vaguely described as any entity, which is an "*organ of a foreign state* or political subdivision thereof — or a *majority of whose shares* is owned by a foreign state or political subdivision thereof" (emphasis supplied).

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[12] Dismissal of a plaintiff's complaint, without consideration of the merits, has grave consequences and should only be imposed in the most extreme circumstances.

In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003), this Court only addressed one part of the continuing controversy over what qualifies as an "instrumentality." There, the Court clarified that, under the second prong of § 1603(b)(2), the foreign state must *directly* own a majority — more than 50% — of the corporation's shares to entitle the company to immunity. However, under the first prong of § 1603(b)(2), a foreign company that is not predominantly owned by a sovereign can still claim immunity if it is an "organ" of the foreign state. Thus, this Court left open the question of what constitutes an "organ" of the foreign state.

The critical term "organ" is *not defined in the statute.* And, as candidly acknowledged by the Solicitor General, this Court has "never addressed the meaning or application" of what constitutes an instrumentality of a foreign sovereign under 28 U.S.C. § 1603(b)(2), even though that provision has "taken on added importance since the Court's decision" in *Dole Food. See* Solicitor General's Brief on Behalf of the United States as *Amicus Curiae* at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006).

As a consequence, without any guidance from this Court, judges across the country are still faced with the perennial issue of how to gauge whether a foreign entity comes within the restraining powers of the FSIA. However, these efforts to determine what constitutes an organ of a foreign state have only led to a growing confusion and inconsistent applications of the law among the circuit courts. In fact, it bears repeating that the

Solicitor General concedes that this "*issue is an important, recurring, and sensitive one that warrants this Court's consideration.*" *See* Solicitor General's Brief at 6, *Powerex* (No. 05-85) (emphasis supplied). This case provides an ideal platform for resolving this issue.

This Petition Should be Considered with the Pending Case of *Powerex Corp. v. Reliant Energy Services, Inc.*, in Which the Solicitor General, as *Amicus Curiae*, Believes Certiorari Should be Granted

The dominant issue presented by this Petition, and that of *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, concerns what standard should be used in determining whether a foreign company constitutes an organ of government, entitling it to immunity from suit under the FSIA. The dynamic nature of this issue is underscored by the concerns of the Solicitor General and the conflicting views of the circuit courts.

Significantly, in *Powerex*, the subsidiary of a Canadian electrical power agency claimed exemption from suit by asserting the clinching argument that it was an "instrumentality" of the Canadian government. The Ninth Circuit held that Powerex's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government," as well as its lack of special privileges or obligations under Canadian law, dictated the conclusion that Powerex was not an "organ of British Columbia." *California v. NRG Energy Inc.*, 391 F.3d 1011, 1026 (9th Cir. 2004). The court reasoned that

since Powerex "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory power," it was not immune from suit under the FSIA. *Id.*

Powerex filed a petition for certiorari asserting the following question:

> Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government. *See* Petition for Powerex Corp. at i, *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85, 74 U.S.L.W. 3050 (July 15, 2005).

Recognizing that these issues present matters of national, as well as international, concern, this Court called upon the Solicitor General to file an *amicus curiae* brief on behalf of the United States. *See Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85, 74 U.S.L.W. 3584 (April 17, 2006). The Solicitor General's brief, filed on November 14, 2006, *recommends that this Court grant certiorari. See* Solicitor General's Brief at 20, *Powerex* (No. 05-85).

The Solicitor General stressed that the Ninth Circuit's application of the FSIA's "organ of a foreign state" provision "conflicts with decisions of other courts of appeals." *Id.* at 6. The Solicitor General also observed that a "critical divergence" exists in the manner in which the various circuits apply their tests concerning whether a foreign company is an instrumentality of that foreign state. *See* Solicitor General's Brief at 9, *Powerex* (No. 05-85).[13]

For example, in *Powerex*, the Ninth Circuit found it significant that the defendant was "not immune from suit" under Canadian law. *Id.* at 10. On the other hand, the Third Circuit has adopted a completely opposite position and holds that whether a defendant is subject to suit in its home country "should not be considered part of the *organ* analysis." *Id.*, citing *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 214 (3rd Cir. 2003) (emphasis supplied). This issue is further inflamed by the Second Circuit's holding that KAMCO does not qualify as an "organ" of the Korean government, for purposes of FSIA immunity, "simply because it is subject to suit alongside private Korean corporations" (App. 37). Thus, it is impossible to reconcile these seriously conflicting standards without final resolution by this Court.

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[13] Several circuits have recently adopted a variety of tests that consider factors such as (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds some exclusive rights in the foreign country; and (5) how the entity is treated under foreign state law. *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004). *See also USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3rd Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000).

Moreover, in *Powerex*, the Ninth Circuit disregarded substantial evidence that the defendant "serves a public purpose" because it "did not conform with the result indicated by the court's mechanical application of other specified factors." *See* Solicitor General's Brief at 10, *Powerex* (No. 05-85). However, adopting a contrary stance, the Second Circuit has now found that the "strong national purpose" underlying KAMCO's creation "weighs heavily in favor of the conclusion that KAMCO is an organ of the Korean government" (App. 32).

The conflict among the circuits, so meticulously cataloged in the Solicitor General's *Powerex* brief,[14] and further galvanized by the decision in this case, should persuade the Court to invoke its supervisory power and forge a

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[14] The Solicitor General also recognized that the *Third* and *Fifth* Circuits emphasize the need for a "flexible approach" under the organ prong of § 1603(b)(2), and that a court should not apply any factors mechanically, or require that all five factors support an "organ-determination." *See* Solicitor General's Brief at 9, *Powerex* (No. 05-85), citing *USX*, 345 F.3d at 208; *Kelly*, 213 F.3d at 847. The Second Circuit embraces a similar attitude (App. 30). However, the Ninth Circuit applies a mechanical approach that is at odds with the other circuits. *See* Solicitor General's Brief at 10, *Powerex* (No. 05-85).

The Solicitor General identified other conflicts dividing the circuits, such as the Ninth Circuit's consideration of the foreign company's commercial activity, rather than regulatory activities, while the Third Circuit cautioned that "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question . . . whether the entity comes within the purview of the FSIA at all." *See* Solicitor General's Brief at 10-11, *Powerex* (No. 05-85), quoting *USX*, 345 F.3d at 210. These inconsistencies among the circuits are illustrative only and by no means exhaustive. However, they highlight the desperate need for some consistency in the law.

unified test, which can be applied nationwide, to bring certainty to a body of law that has been destabilized by the lack of an authoritative definition regarding what is an "instrumentality" or "organ" of a foreign state.

Uniformity in application of the FSIA is imperative for both American and foreign litigants. As an example, foreign companies that cause American citizens damage in the *Ninth Circuit* are much more vulnerable to suit under its standards than defendants in the *Second Circuit*. This is intolerable under the premise of "one nation, one law." It is bound to lead to an intense and growing uncertainty, as well as forum shopping by litigants who will seek to find a circuit favorable to their cause.

It is difficult to imagine a more profound or unsettling question of national and international importance, which looms so forebodingly over this rapidly expanding area of the law. Today, in view of an exploding global economy, litigation between American and foreign corporations is bound to accelerate at an alarming pace. Since foreign firms can easily claim to be organs of their local governments, they will continue to strategically exploit the immunity provided under the FSIA and to cannily elude the jurisdiction of our courts. Thus, Americans, damaged by foreign concerns, will be left without a forum to air their claims. Unless corrected, plaintiffs in the Second Circuit will be more defenseless against those who have harmed them — than plaintiffs in the Ninth Circuit.

This case, together with *Powerex*, are ideal vehicles for resolving the chaos caused by the ambiguity of the key statutory terms of "instrumentality" and "organ" under the FSIA. This continuing debate also raises the question of whether a foreign state's unilateral determination that a corporation is not immune from suit in its own country should preempt consideration in our courts of other indices, such as the circumstances of the entity's creation, its purpose, the state's degree of involvement in the company's affairs, its employment practices, any financial support from the foreign government or exclusive rights granted by the sovereign state.

Simply put, where the Republic of Korea views KAMCO as a private entity under its own laws, it is wrong to deem KAMCO a foreign sovereign free from suit in this country. For instance, in Korea, KAMCO *pays taxes*; its employees are *subject to suit* for their tortious actions; it charges *fees* for its services; its private shareholders earn millions of dollars each year in *profits*; it has *no* government employees; and it is privately managed. As a consequence, under the law of Korea, KAMCO is clearly a private entity.[15] But, here, it has been held to be immune from suit.

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[15] This case points up the awful dangers caused by the conflicts in the circuits. And, our facts are even more compelling than *Powerex*, which the Ninth Circuit found *not* to be an organ of the Canadian government even though it was *wholly* (although indirectly) owned by a governmental agency. In contrast, KAMCO's shareholders include *private banks*, which have earned millions of dollars in profit. However, we urge that certiorari is warranted in *both* cases because, together, they inform the debate with the perspectives of the Second *and* Ninth Circuits.

Other minor factors identified by the Second Circuit, such as whether it was created for a national purpose, or whether it holds some exclusive rights in Korea,[16] are irrelevant where the *sovereign state, itself, regards the business as a private concern* for this very type of tort action. In a word, if it's not an organ of the government in Korea, then it's certainly not an organ of the Korean government here! We can no longer afford to distance ourselves from these pressing questions that are of global proportions.

II. Certiorari Should be Granted to Address When a Hearing is Warranted Under the Foreign Sovereign Immunities Act

Jack Murphy and AK Capital were defrauded of $27 million. Nevertheless, the district court dismissed the complaint without even conducting a hearing to settle the critical factual and legal disputes that flared among conflicting experts' affidavits regarding application of the Foreign Sovereign Immunities Act. As a consequence, this case also presents questions concerning whether, as a matter of due process, an evidentiary hearing should have been granted, *and* whether the commercial exception to FSIA protection, 28 U.S.C. § 1605, should have been invoked.

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[16] Of course, these collateral considerations can be entirely consistent with a private enterprise that has had these privileges extended to it by the government.

From the moment KAMCO moved to dismiss the complaint, Jack Murphy repeatedly sought a hearing to address the strenuously contested factual and legal questions relating to the many issues presented by this case (*see, e.g.*, A. 347, 573). Specifically, counsel asserted that a hearing was necessary to resolve the factual issues regarding the FSIA that are not readily ascertainable from the affidavits provided by the witnesses, such as whether KAMCO qualifies as an organ of the Republic of Korea (A. 573).

Although the district court granted an evidentiary hearing (App. 5), it *severely* limited the proof to witnesses who could supplement their written submissions with further evidence on the sole issue of whether KAMCO is entitled to immunity under the FSIA (A. 582). The court refused to afford counsel any opportunity to examine KAMCO's witnesses, who filed the disputed declarations on the predominant FSIA issues.

Therefore, although electing not to present any *additional facts* on the FSIA matter, counsel made clear that "this conclusion does not, in any way, detract from our initial application for a hearing on the conflicting facts and law presented by the opposing affidavits between the parties" (A. 582).[17] Essentially, counsel sought an opportunity to be heard — and to challenge KAMCO's conclusory affidavits — on what became the dispositive issue concerning whether KAMCO was an organ of the Korean government.

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[17] The district court's decision suggests that Jack Murphy waived a hearing without discussing this important reservation of his rights to resolve the factual and legal conflicts presented by the opposing affidavits (App. 4-5).

Here, the factual and legal issues in dispute could not be readily resolved from the written submissions. And, these disputes go directly to the ultimate determination of whether KAMCO is an "organ" of the Republic of Korea. This is evidenced by the district court's own decision, which found some of the balancing factors teetering evenly between KAMCO and Jack Murphy (App. 35, 38). Indeed, the district court concedes that in certain instances KAMCO behaves as a for-profit organization, while in other respects it acts as a non-profit business (App. 38). Under such circumstances, the district court should have held a hearing where live testimony could have been presented and the *facts* could have been tested through the crucible of cross-examination.

The need for a hearing is further heightened by the extreme consequences to Jack Murphy resulting in the dismissal of his complaint! Thus, we urge that, at the very least, the district court should be directed to hold a hearing to resolve the disputes that pertain to KAMCO's assertion that it falls under the protections of the FSIA, and is immune from suit in the United States. The absence of full adversarial testing of Jack Murphy's claims cannot help but erode confidence in our judicial system.

A terrible injustice has been done to a United States citizen and a domestic company by an independent corporate entity that does business in the United States and maintains offices in New York. KAMCO, which caused an American company to lose millions of dollars through fraudulent representations, should not be able to escape the jurisdiction of our courts and avoid the considerable consequences of its misconduct by

gaining immunity under the FSIA. The courts of this nation have a substantial interest in ensuring that its citizens can obtain justice, and that those who do business here, are accountable for their actions.

Certainly these issues are of sufficient magnitude and immediacy to warrant the full attention of this Court. Now is the time to address, once and for all, these important questions, which are bound to recur and continue to encircle the scope of FSIA immunity for profitable joint-stock companies that may also have some quasi-governmental purposes. Thus, the ruling here is destined to have wide ramifications throughout the nation.[18] Therefore, we urge that this matter is significant enough for this Court to exercise plenary review.

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[18] AK Capital lost *$27 million* in this important case. The district court's decision, which was endorsed by the Second Circuit, is published and available to the entire legal community. *See Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627 (S.D.N.Y. 2005).

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Second Circuit's order in this case. In the alternative, this Petition should be held pending the Court's determination in the *Powerex* case.

November 22, 2006

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 9/30/05

JOHN M. MURPHY, et al.,

Plaintiffs,

- against -

04 Civ. 2598 (RJH) (HBP)

KOREA ASSET MANAGEMENT CORP., et al.,

ORDER

Defendants.

Defendants' motion to dismiss is granted on the grounds that defendant is an organ of the Korean government and therefore entitled to immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601, *et seq.* An opinion setting forth the basis of the Court's decision will be issued shortly.

SO ORDERED.

Dated: New York, New York
September 30, 2005

/s/ Richard J. Holwell
Richard J. Holwell
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 10/19/05

JOHN M. MURPHY, et al.,

Plaintiffs,

-against-

KOREA ASSET MANAGEMENT CORP., et al.,

Defendants.

04 Civ. 2598 (RJH) (HBP)

OPINION AND ORDER

OPINION AND ORDER

This action stems from the bankruptcy of Hanbo Iron & Steel Co., Ltd. ("Hanbo" or "Hanbo Steel"), a bankruptcy so colossal that, by many accounts, it precipitated the so-called "Asian financial crisis" of the late 1990's. At one time Korea's second-largest steel manufacturer, as well as a prominent member of a leading Korean conglomerate, or "chaebol," Hanbo collapsed in January 1997 under more than $6 billion of debt, most of which was associated with a single capital project called the "Dangjin Works Facility." As Hanbo's debt declined in value, much of it was acquired by a state-created entity known as the Korea Asset Management Corporation

("KAMCO"). Ultimately, KAMCO was to become Hanbo's largest creditor, and would play an important role in the company's bankruptcy, as well as the eventual sale of its assets at international auction.

Derivative plaintiff John M. Murphy, acting on behalf of AK Capital, LLC ("AK Capital"), now contends, *inter alia,* that KAMCO fraudulently misled AK Capital and conspired against AK Capital in connection with the Company's failed attempt to purchase Hanbo's assets at one such auction. In particular, Murphy contends that KAMCO made several false representations to AK Capital, including (1) that KAMCO would have *de facto* control over the auction; (2) that if AK Capital were the successful bidder, KAMCO would use its best efforts to help AK Capital consummate the purchase; and (3) that a $10 million earnest money deposit would be the maximum required up-front payment. Murphy further alleges that KAMCO conspired to defraud AK Capital and to prevent it from closing on the sale and purchase agreement, and that KAMCO tortuously interfered with the sale and purchase agreement. For these alleged wrongs, plaintiffs seek $1 billion in actual and punitive damages.

By motion dated June 11, 2004, KAMCO moved to dismiss the case, arguing that (1) KAMCO is an organ of the Korean government, and therefore entitled to immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (the "FSIA"); (2) the doctrine of *forum non conveniens* precludes plaintiffs' case from being heard in this jurisdiction; (3) the complaint does not comply with Local Rule 23.1 and Fed.R.Civ.P. 9(b); and (4) the complaint does not state a claim under Korean law, which would control the action. Murphy opposed the motion on all grounds and also asked the Court to conduct

an evidentiary hearing before ruling, indicating at one point his belief that a hearing was "imperative" given the "critical factual disputes" presented by KAMCO's motion. (Pl. Opp. to KAMCO's Mot. to Dismiss, p. 14 ("Opp. Memo."); Pl. Sur-Reply, p. 4).

On April 28, 2005, the Court granted Murphy's motion for an evidentiary hearing, but only with respect to the issue of FSIA immunity.[1] Less than one month later, by letter dated May 19, Murphy advised the Court that — upon further consideration — he did *not* believe a hearing would be necessary, at least with respect to the issue of FSIA immunity. (May 19, 2005 Letter from Herald Price Fahringer to the Court). That same day, KAMCO likewise notified the Court that it did not think an evidentiary hearing was needed. On this basis the Court proceeded to the merits of the motion and, on September 30, 2005, issued an order dismissing the case on the ground that KAMCO is entitled to FSIA immunity.

The basis for the Court's ruling is set forth below.

FINDINGS OF FACT

A motion to dismiss premised on FSIA immunity is equivalent to an attack on a court's jurisdiction, which means that this Court must look outside the pleadings in resolving KAMCO's motion. *See Robinson v. Gov't of Malaysia,* 269 F.3d 133, 140 n. 6 (2d Cir. 2001) (explaining that "[a] district court 'may' consult evidence to decide a . . . motion [premised on FSIA immunity but it] 'must' do so

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[1] The Court granted the motion in recognition of the Second Circuit's observation in *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales* that it is "essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction." *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales,* 235 F.3d 738, 748 (2d Cir. 2000).

if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction"). In this case, the parties have submitted substantial evidence on the issue of FSIA immunity, including testimony from two experts, and several individuals who were involved in AK Capital's attempt to purchase Hanbo's assets.[2] Having considered this evidence, as well as the parties' memoranda and supporting material, the Court makes the following factual findings.

A. Hanbo's Bankruptcy

Hanbo Iron & Steel Co., Ltd. rose to become Korea's second largest steel maker through a series of aggressive expansions. In 1990, Hanbo began work on the most ambitious and capital-intensive of these projects, the Dangjin Works Facility. If completed, the Dangjin plant was to be the company's crown jewel — one of the world's largest and most technologically advanced

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[2] For ease of reference, the Court sets forth in this footnote the nine individuals who have submitted testimonial evidence in connection with KAMCO's motion. Three individuals have submitted affidavits or declarations in *opposition* to KAMCO's motion: Jo Wan Kim, an expert in Korean law, is a professor at the College of Law at Korea University; John M. Murphy, the derivative plaintiff in this suit, was involved in Hanbo's attempted asset sales via his "membership" in AK Capital and his friendship with Alex Kwon, the principal of AK Capital; and Howard M. Cohen, who participated in a failed private sale to Alex Kwon as Kwon's counsel. In addition, six individuals have submitted affidavits or declarations in *support* of KAMCO's motion: Jinsu Yune, an expert in Korean law, is a former Korean judge, and is currently a professor of law at Seoul National University; Kyung-Ho Song, is the acting managing director at KAMCO; Jae-Ho Park is an Executive Director at KAMCO; Soung-Soon Choi is a Korean attorney, and partner at Yoon & Yang, Hanbo's lead counsel during a proposed private asset sale to Kwon; Dae-Sung Kim is the general manager of the litigation department of KAMCO; and Kyung-Man Huh is a former employee of KAMCO.

steelworks. (June 11, 2004 Decl. of Soung-Soon Choi, ¶ 12 ("Choi Decl.")). While under construction, however, the debt required to finance the project left Hanbo vulnerable to sudden shifts in the economy. In 1996, as the facility neared completion, Hanbo was hit with a disastrous one-two punch: the world steel industry entered into a recession at the same time the Korean economy began to lag. Despite a series of emergency loans from major Korean banks, in early 1997 Hanbo collapsed under more than $6 billion of debt.[3]

On January 23, 1997, Hanbo filed for corporate reorganization with the Bankruptcy Division of Seoul Central District Court (the "Bankruptcy Court"). As was standard practice, the Bankruptcy Court immediately appointed a trustee (the "Trustee") and empaneled a Representative Creditor Board (the "Creditor Board") to oversee the bankruptcy proceedings. The Trustee acted as a liaison between the Bankruptcy Court and the Creditor Board. In that capacity, the Trustee would submit regular reports to the Court on the progress of the effort to dispose of Hanbo's assets; the Trustee would also communicate the Court's instructions to interested parties, including the Creditor Board. (Choi Decl.,

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[3] Hanbo's bankruptcy was international news, both because it was one of the largest in Korean history and because, by many accounts, it precipitated the so-called "Asian financial crisis." *See, e.g.*, Reger du Mars, *Hanbo on Sale Fast Track*, THE DAILY DEAL, May 28, 2004 ("Hanbo . . . was one of the precipitating bankruptcies of the Asian financial crisis"); Charles Smith, *Yamato Kogyo Eyes Hanbo Corp.*, THE DAILY DEAL, June 28, 2002 ("Hanbo['s] . . . collapse[ ] . . . helped kick off the Asian financial crisis."). The bankruptcy also attracted a great deal of national interest amid speculation that top Korean officials had forced several Korean banks to extend credit to keep Hanbo afloat, even after it became clear that bankruptcy was unavoidable.

¶ 15). The Creditor Board, in turn, was composed by representatives from thirty-five of Hanbo's institutional creditors. Together, the Trustee and the Creditor Board would manage the day-to-day bankruptcy process.

As Hanbo's largest creditor and a leading member of the Creditor Board, the defendant in this case, KAMCO, would figure prominently in that process.

B. KAMCO

The Korea Asset Management Corporation was established by the Korean government on April 6, 1962, with passage of the Korea Development Bank Act ("KDBA"). Under the terms of the KDBA, KAMCO was to be a subsidiary of the Korea Development Bank ("KDB"), and would have three primary functions: to manage properties owned by the Korean government, to collect certain unpaid tax liabilities, and to liquidate KDB's non-performing assets. (June 10, 2004 Declaration of Kyung-Ho Song, p. 2 ("Song Decl.")). For the next thirty-five years, until the onset of the Asian financial crisis, these functions would remain largely unchanged.

In 1997, with the Korean economy failing, the government reorganized KAMCO pursuant to the Act on Efficient Disposal of Non-Performing Assets of Financial Institutions and Establishment of Korea Asset Management Corporation (the "KAMCO Act"). (*Id.; see also* Jan. 1, 2005 Second Decl. of Je Wan Kim, ¶ 31 ("Second Kim Decl.")). Under the KAMCO Act, KAMCO was newly empowered to (i) to support and normalize distressed financial institutions by monitoring and resolving operational difficulties; and (ii) to perform the role of a "bad bank," *i.e.* to facilitate corporate recovery, to minimize taxpayer costs, and to recover public funds by efficiently disposing of non-performing

loans. These objectives were memorialized by KAMCO's new mission statement: "to accelerate the resolution of non-performing assets held by financial institutions, and to efficiently support the management normalization, etc. of the enterprises showing signs of insolvency." (KAMCO Act, Art. 6, attached as Ex. 2 to Song Decl.).

To facilitate and finance these objectives, the KAMCO Act created the Non-Performing Loan Resolution Fund (the "Resolution Fund"), and gave KAMCO the exclusive authority to control and manage the Resolution Fund, as well as any non-performing loans it acquired. (Song Decl., p. 2). The Resolution Fund was initially infused with 21.6 trillion Korean Won, most of which came from the issuance of government-guaranteed bonds. KAMCO, by contrast, is a corporation wholly owned by its shareholders, which include the Korean government (42.8%) and the Korea Development Bank (28.6%), an agency of the Korean government, as well as a group of private Korean banks (28.6%). (KAMCO Act, Arts. 10, 11; Second Kim Decl., ¶ 17; Song Decl., p. 2).[4]

KAMCO shares other characteristics with a typical corporation. It has a board of directors, officers, and employees (KAMCO Act, Arts. 17, 22); it also has 1 trillion Korean Won of "authorized capital," (KAMCO Act, Art. 9), and a paid-in capital of 140 billion Won. (Second Kim Decl., ¶ 17). In at least one respect, KAMCO also "behaves" like a typical for-profit corporation: in order to achieve its purpose of "resolv[ing] . . . nonperforming assets held by financial institutions," KAMCO engages "distressed debt professionals" to repackage and sell non-performing loans to domestic and

[4] All figures are as of June 10, 2004. The private banks include Kookmin Bank, Woori Bank, Hana Bank, and Export Import Bank. (Second Kim Decl., ¶ 17).

international investors in a variety of ways, including by issuing asset-backed securities, conducting international auctions, or by establishing asset management corporations. (KAMCO Act, Art. 26; Song Decl, p. 11); *see, e.g., Steinhardt Group, Inc. v. Citicorp,* 1996 WL 790097, at *1 (D.Del. Dec. 2, 1996) (describing how Citicorp devised a plan to "securitize" its non-performing assets by selling them to limited partnerships outside the banking industry). In 2003, KAMCO generated a modest profit of approximately $19 million. (Oct. 11, 2004 Decl. of Je Wan Kim, ¶ 70 ("J. Kim Decl.")).

Nonetheless, in many respects KAMCO does not actually operate as a "for profit" corporation. In using the Resolution Fund to acquire non-performing loans, KAMCO, after consultation with government authorities, negotiates prices that are substantially in excess of what the loans are worth on the open market — in effect subsidizing the holder of the bad debt. (Song Decl., ¶ 12). Perhaps of greater significance (at least for purposes of FSIA immunity), profits and losses associated with the acquired non-performing loans — including those associated with Hanbo's debt — are not accounted for on KAMCO's financial statements, and any profits from such loans are distributed to the institutions that contributed money to the Resolution Fund, not to KAMCO's shareholders. (Nov. 25, 2004 Reply Decl. of Jinsu Yune, ¶ 10 ("Yune Reply")). Moreover, the distribution of any profits arising from KAMCO's other operations is subject to further limitations not applicable to for-profit corporations. (*Id.*). Collectively, these restrictions and limitations reflect the fact that, whatever KAMCO's similarities to a typical corporation, it performs several functions most often associated with — and in most cases reserved for — governments or their agencies.

First, as noted at the outset, KAMCO is vested with the exclusive authority to oversee and control a public fund backed by government securities, the Resolution Fund. In this capacity, KAMCO is responsible for recovering "public funds" by acquiring and disposing of non-performing assets, and otherwise promoting financial stability by supporting and normalizing distressed financial institutions. Second, under the Korean National Tax Collection Act and the Korean Customs Act, KAMCO is authorized to conduct public auctions of property seized by the Korean Tax Authority ("KTA") or the Korean Customs Authority ("KCA"). (Yune Reply, ¶ 11). Indeed, when conducting such auctions, KAMCO is considered to actually *be* the KTA and the KCA for at least one purpose: KAMCO is potentially subject to suit as an *administrative agency* under the Korean Administrative Litigation Act ("ALA") for actions taken while conducting auctions. (*Id.;* ALA, Ex. 12 to Yune Reply). Finally, under Korea's State Properties Act, the Ministry of Finance and Economy may entrust KAMCO with works concerning administration and disposal of certain properties owned by the Korean government. (*Id.*, Ex. 15).

KAMCO also receives certain benefits under the KAMCO Act not available to a typical corporation. For example, under Article 33(3) of the KAMCO Act, the government may "guarantee the repayment of principal and interest of debentures issued by . . . KAMCO"; pursuant to Article 46, KAMCO is exempt from paying certain specific taxes, such as acquisition and securities transaction taxes, and also potentially benefits from any other tax relief that the national or local governments deem "necessary" for KAMCO's welfare; and under Article 9(3), "[t]he government may, when it is deemed necessary to support the performance of KAMCO's services, make a capital

investment in KAMCO or support necessary expenses." This last provision essentially means that the Korean government can assume KAMCO's debts, pay its employees, or provide any other financial support it deems necessary. (Yune Reply, ¶ 22).

Moreover, precisely because KAMCO performs these governmental functions, and receives these special benefits, it is subject to far more oversight and control than a normal corporation. To begin, KAMCO is supervised by the Korean Financial Supervisory Commission ("FSC"), an agency of the Korean government, which itself reports directly to the President of Korea. (KAMCO Act, Arts. 47, 48). The FSC has the authority to appoint and remove KAMCO's auditor, and also has *ex post facto* authority to approve or reject KAMCO's "Managing Director" or CEO after selection by its shareholders. (KAMCO Act, Art. 17; Yune Reply ¶¶ 4(d), 12). The FSC also collects and reviews the Resolution Fund's annual closing statement, balance sheet, and income statement at the end of each fiscal year. (Song Decl., p. 4; Yune Reply, ¶ 13). KAMCO's control of the Resolution Fund also subjects it to the supervision of the Public Fund Oversight Committee of the Ministry of Finance and Economy, as well as the auditing authority of Korea's National Assembly's Board of Audit and Inspection ("BAI"), which is responsible for auditing all agencies of the Korean government. (Song Decl., p. 5; Yune Reply, ¶¶ 4(e), 9, 14). And because KAMCO is subject to audit by the BAI, it is also subject to annual inspection and special investigation by Korea's National Assembly. (Yune Reply, ¶ 17).

Even more significantly, KAMCO is required to pass all resolutions concerning amendments to its operational policies, including its policies for the Resolution Fund, through a Management Committee composed of eleven

members, including public officials from Korea's Ministry of Finance and Economy, Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service, which is the executive arm of the FSC. (KAMCO Act, Art. 14; Yune Reply, ¶¶ 4(c), 15). And under certain circumstances, KAMCO is subject to the Korean Framework Act on the Management of Government Affiliated Institutions ("FAGAI"), pursuant to which its management objectives, business plans, and budgets are subject to adjustment and review by the Korean government. (Yune Reply, ¶ 5(a)).

Taking a broader view of these facts, it is clear that KAMCO acts — in many, if not most respects — as would any agency of the Korean government. The question, of course, is whether KAMCO is *enough* like an agency to qualify as an "organ" of the Korean government, as that term is used in the Foreign Sovereign Immunities Act. Before resolving that issue, however, the Court must provide some context for KAMCO's role *in this case,* which takes us back to the events surrounding Hanbo's bankruptcy.

C. The First Auction

As noted, *supra,* the Korean government dramatically expanded KAMCO's role at about the same time that Hanbo collapsed. The expansion was not coincidental. To the contrary, KAMCO was reorganized in 1997, in part, to acquire the billions of dollars of non-performing loans issued to Hanbo, including almost $8 billion of loans from the Korea First Bank and Seoul Bank. And it did just that, becoming Hanbo's largest creditor by the time the Creditor Board was empaneled in 1997. On this basis, KAMCO was appointed the "primary representative" of the Board, which meant that a KAMCO executive sat as the chair of the Joint Management Committee, a subcommittee of the Board comprising Hanbo's eleven

largest creditors. (Kyung-Ho Song Decl., p. 6).[5] In addition, a KAMCO employee served as chief of the "Sales Bureau," which was created in 2001 by the Joint Management Committee and the Trustee to implement the Joint Management Committee's directives and to oversee the day-to-day activities relating to the disposition of Hanbo's assets. Although all decisions were ultimately subject to the approval of the Bankruptcy Court, KAMCO was effectively the creditors' representative. (*Id.*, p. 7; Choi Decl., ¶¶ 28-30).

By 1998 the Creditor Board (led by KAMCO) had decided that Hanbo's assets would be sold at a public auction (the "First Auction"). At the close of the First Auction a group of investors known as the "Nabors Consortium" was selected as the preferred bidder, and, on March 8, 2000, entered into a sale and purchase agreement (the "Nabors SPA") for Hanbo's assets. Although the transaction was not set to close until September 30, 2000, the Creditor Board did not require the Nabors Consortium to put down an earnest money deposit (or for that matter any other non-refundable security). Thus, when the Consortium backed out of the Nabors SPA before the deal closed, the Creditor Board was left without financial recourse. (*See* September 30, 2000 letter from Kwon to KAMCO ("Kwon Letter"), attached as Ex. A to Decl. of Dae-Sung Kim ("Kim Decl.")).

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[5] The other members of the Joint Management Committee were the Korea Development Bank, Chohung Bank, Korea Exchange Bank, Woori (Hanvit) Bank, Hana (Seoul) Bank, Allianz Life Insurance, Seoul Guarantee Insurance, Daewoo Securities, KDB Capital and Korea Development Leasing Corporation.

D. The Proposed Private Sale

Soon after the Nabors SPA fell through, the Creditor Board received a competing offer for Hanbo's assets. By letter dated September 30, 2000, a Korean national named Ho-Sung (Alex) Kwon offered to assume the Nabors SPA and purchase Hanbo's assets outright in a private sale. (September 30, 2000 Kwon Letter). Kwon's offer was by no means happenstance; at the time the Nabors Consortium was formed, Kwon was its largest shareholder. (*See* Kim Decl., p. 2; *see also* Request for Provisional Seizure of Credits, attached as Ex. C to November 24, 2004 Supplemental Decl. of Seung-Soon Choi ("Choi Supp. Decl.")). Kwon is also the son of Chul-Hyun Kwon, a Korean steel magnate and founder of Union Steel Co., Ltd, a prominent Korean steel manufacturer. He was, in short, a credible suitor.

Kwon's letter explained that the Consortium attempted to exclude him because he refused to agree to immediately resell Hanbo to a third party, an intention he characterized as "impure." (*Id.*). By contrast, Kwon stated that it was his desire to "re-establish" Hanbo as a "leading domestic steel company." Kwon also pointed out that a direct sale would be far quicker than a second public auction. Kwon followed up his September 30 letter with an October 3, 2000 visit to the offices of the Hanbo Divesture Task Force, where he further discussed his proposal for assuming the terminated contract. (Kim Decl., ¶ 10). During the October 3 meeting, which was held in Korea, Kwon noted that he was in the process of negotiating an assignment of the contract with the Nabors Consortium, and explained why he felt he was in the best position to purchase Hanbo's assets.

(*Id.*, ¶ 11). Although it is not clear exactly how the creditors viewed Kwon's proposal, there was enough interest on both sides to discuss the offer on at least one additional occasion.

On October 13, 2000, Kwon met with KAMCO representatives at the Palace Hotel in New York City to present the terms of his offer. (November 24, 2000 Decl. of Kyung-Man Huh, ¶ 11 ("Huh Decl.")). It was not an informal meeting — both sides were represented by financial and legal advisors. Kwon was represented by attorneys Howard Cohen, Marshal Lester and William E. Sudow, as well as Fred Gorsetman, a financial consultant, and Chuck Bradford, a steel industry consultant. In addition, derivative plaintiff John M. Murphy attended the meeting, albeit as an advisor to Kwon.[6]

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[6] The Court finds that Murphy attended the October 13, 2000 meeting solely as an advisor to Kwon. In his affidavit Cohen claims otherwise, stating that Murphy attended the meeting as a "principal" of "AK Capital." (October 14, 2004 Decl. of Howard M. Cohen, p. 2 ("Cohen Decl.")). But Murphy himself is not so sure. Although he claims to have been "an integral part of the negotiations for the purchase of Hanbo," (Murphy Decl., ¶ 2), his declaration indicates that his role in the meeting derived from — and did not extend beyond — his status as an advisor to Kwon. Indeed, Murphy characterizes himself as Kwon's "advisor on business and international matters," a position he has held for "more than 20 years." (Murphy Decl., ¶ 8). Murphy also notes that the purpose of the October 13 meeting was to "consider[ ] a private sale of Hanbo['s] . . . assets to Alex Kwon." which does not suggest that Murphy was to have a direct stake in any deal that resulted from the meeting. (*Id.*, ¶ 12). On this basis, and despite Cohen's conclusory statement to the contrary, the Court finds that Murphy attended the meeting on Kwon's behalf. This conclusion is supported by the Court's finding, *see infra,* that the plaintiff in this action, AK Capital LLC, did not even exist as of October 13, 2000.

KAMCO was also represented at the meeting by legal counsel — David Yu of Daeryook International, a Korean law firm, and David Goldman of McDermott, Will & Emery (Cohen Aff., ¶ 2; Huh Decl., ¶ 10) — and also by several officers and employees: Kyu-Jim Kim, a KAMCO Senior Manager, Jong-Jin Lee, head of KAMCO's restructuring fund team, and Kyu-Man Huh, a Deputy Vice President for KAMCO. Although Huh was authorized by the President of KAMCO, Jae-Ryong Chong, to meet and discuss the terms of a private sale with Kwon, (Murphy Decl., ¶¶ 11-12), he had little familiarity with the Hanbo bankruptcy proceedings, and was therefore not "authorized to negotiate the terms of a sale of Hanbo's assets to . . . Kwon." (Huh Decl., ¶ 9). Rather, Huh's role was limited to "receiv[ing] and discuss[ing] . . . Kwon's proposal." (*Id.*).

Given this limited authority, it is perhaps not surprising that the parties did not reach an agreement on October 13. According to Huh, and as corroborated by Cohen, talks stalled primarily because Kwon was not prepared to pay a $12.5 million earnest money deposit. (Huh Decl., ¶ 11; Cohen Aff., ¶ 5 ("the parties could not reach closure on an issue involving collateral security")). This was a non-negotiable term (or at least one from which Huh was not authorized to deviate). Huh states that when the meeting concluded he told Kwon that he had until 8:00 p.m. the following evening to confirm that he was prepared to pay the $12.5 million deposit or risk losing the deal. (*Id.*, ¶ 12). Although there is no record of whether Kwon responded, David Goldman, who attended the meeting as counsel for KAMCO, drafted a letter agreement immediately following the meeting memorializing the events of the day. (*See* October 13, 2000 letter from Hanbo to AK Capital B.V. ("Goldman Letter"), attached as Ex. A to Huh Decl.).

Although Huh characterizes the Goldman Letter as nothing more than a "convenient way of memorializing the terms that . . . Kwon had placed on the table," the Letter reveals that the October 13 negotiations were quite serious. (Huh Decl., ¶ 13). Like Kwon's September 30 letter, the Goldman Letter suggests that the terms of any private sale would have closely tracked the failed March 8, 2000 Nabors SPA, *i.e.* Kwon would step into the shoes of the Consortium, albeit through an entity he controlled, "AK Capital B.V."[7] The Letter also reveals that Kwon and KAMCO discussed — and perhaps agreed in principle upon — a total earnest money deposit of $12.5 million, subject to his ability to produce commitment letters satisfactory to Hanbo's creditors. At the same time, it is clear that the Goldman Letter was *not* intended to be binding on the parties; to the contrary, it was to take effect *only if,* by November 15, 2000, (i) AK Capital B.V. made an initial earnest money deposit of $5 million; (ii) the parties agreed on the form of a binding "definitive agreement," and (iii) the terms of the sale received the approval of Hanbo's creditors and the Bankruptcy Court in Korea. (*Id.*, p. 2).

Although it is undisputed that these conditions were never met, there is some evidence that the parties continued to work towards a private sale after the October 13 meeting. For example, Cohen states that — at some point after October 13 — he wrote KAMCO with a "proposal seeking to bridge the gap" that separated the parties. In response, Cohen received a communication from Nathan Nahm of Hughes Hubbard and Reed LLP, another of KAMCO's legal counsel, indicating that there

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[7] The Goldman Letter is both addressed to AK Capital. B.V. and expressly notes that the purpose of the letter is to "set forth the terms under which [Hanbo] proposes to sell certain of its assets to AK Capital B.V." (Goldman Letter. p. 1).

was still a chance the Kwon private sale would go through. According to Cohen, this exchange prompted a "two-week telephone dialogue," an effort that was directed at finalizing the terms of the deal. (Cohen Aff., ¶ 8). Declarations from KAMCO executives also support the conclusion that the creditors were serious about a private sale. Jae-Ho Park, an Executive Director at KAMCO familiar with the discussions, notes that "[f]rom November 2000 [to] Spring 2001" Kwon and his representatives "repeatedly requested meetings to discuss their proposal to purchase Hanbo's assets." (Nov. 24, 2004 Decl. of Jae-Ho Park ("Park Decl."), ¶ 8). Park also notes that Kwon made a formal presentation to the Joint Management Committee in December 2000, which, as noted, included representatives from Hanbo's twelve largest creditors. (*Id.*, ¶ 8). Finally, Park states that Kwon met with Hanbo's creditors in Korea as late as March and April of 2001, suggesting that the parties were still discussing a private sale to Kwon as late as that spring. (*Id.*, ¶ 12).

Despite these efforts, it is undisputed that the Kwon deal was not consummated, According to Park, the Joint Management Committee ultimately concluded that a private sale might be illegal, and in any case felt it would have been "unfair to other potential investors." (Park Decl., ¶ 8). On this basis, the Committee informed AK Capital B.V. that it was now planning to sell Hanbo's assets through a second public auction (the "Second Auction"). (*Id.*). Before discussing the Second Auction in more detail, the Court will address a point of some confusion, namely, whether the plaintiff in this case, AK Capital LLC, was a party to the proposed private sale

discussed at the October 13, 2000 meeting and into the spring of 2001. (*Id.*). Resolution of that question will bear on the availability of the "commercial activity" exception to FSIA immunity, as discussed more fully, *infra.*

E. AK Capital B.V. and AK Capital LLC

Aside from the obvious fact that both AK Capital LLC and AK Capital B.V. were presumably named for Alex Kwon, there is nothing to suggest that AK Capital LLC was involved in the October 13, 2000 meeting. To begin, it appears from the record before the Court that the two entities are legally distinct. AK Capital LLC is a Delaware limited liability corporation, and, judging by its name, AK Capital B.V. is a foreign corporation, presumably registered in the Netherlands.[8] Moreover, it appears that AK Capital LLC had not been incorporated as of October 13, 2000, and therefore could not have participated in the meeting held in New York. According to Murphy, he and Kwon co-founded AK Capital LLC only after it became clear that "a private sale could not be consummated," which could not have been until sometime after the October 13 meeting, and perhaps as late as April 2001.

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[8] Corporations ending in "B.V." are generally registered with the Netherlands' tax authority.

(Murphy Decl., ¶ 13).[9] On this basis, and because there is no other evidence in the record that AK Capital LLC was represented at the October 13, 2000 meeting, the Court finds that the company was not directly involved in Kwon's private offer to assume the Nabors SPA, which was the sole purpose of the October 13, 2000 meeting. Rather, as acknowledged by Murphy, AK Capital LLC was formed to participate in the Second Auction, to which the Court now turns.

F. The Second Auction

Having concluded that a private sale would not be possible, Hanbo's creditors commenced the Second Auction in July 2001. Unlike the First Auction, the Second was conducted largely through the creditors' financial advisor, Lehman Brothers Korea ("LB Korea"). The process was as follows. On July 27, 2001, LB Korea distributed bidding instructions to various potential investors, including AK Capital. (Choi Decl., ¶ 34). Bidders were required to submit their bids to LB Korea, and were asked to direct all communication regarding the bidding process in the

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[9] Although Murphy contends that he and Kwon co-founded AK Capital LLC, there is significant evidence that Kwon was AK's single "active" member. (*See, e.g.*, Murphy Decl., pp. 2, 3, 7 (characterizing Murphy as a "co-found[er]" of AK); Choi Decl., ¶¶ 8, 22; Memorandum of Understanding, attached as Ex. 2 to Choi Decl.). At various points in the record, including in documents submitted by AK Capital in connection with the Second Auction, Kwon is described as AK Capital's "manager," (Murphy Decl., p. 7), its "President and only active member," (Choi Decl., p. 7), its "General Partner, Member/Manager, Trustee or Officer," (Memo. of Understanding, attached as Ex. 5 to Choi Decl.), and its "Chairman and Chief Executive Officer." (Memo. of Understanding, attached as Ex. 9 to Choi Decl.).

same manner. (Choi Decl., ¶ 31). All bidders were required to submit a $1 million non-refundable bidding deposit prior to participating in the first round of the auction, which was to be non-binding on the participants.

AK Capital LLC submitted a non-binding bid of $400-$450 million and was selected as a final bidder. In order to proceed to the final round, which would be binding, AK Capital was required to enter into a "bidding" memorandum of understanding ("Bidding MOU"), which set forth the procedures for the final bid. (Bidding MOU, attached as Ex. 5 to Choi Decl.). Kwon executed AK Capital's Bidding MOU on August 23, 2001. (Choi Decl., ¶ 36). Several months later, LB Korea sent AK Capital and the other final bidders an Addendum to the Amended Bidding Instructions for the proposed asset sale. (Amended Bidding Instructions, attached as Ex. 7 to Choi Decl.). The Amended Bidding Instructions required the successful final bidder to pay an earnest money deposit of $10 million, comprising a $1 million refundable deposit to be submitted with the bid, and an additional $9 million to be deposited if selected as the winning bidder. (*Id.*, p. 2).

On November 30, 2001, AK Capital submitted its binding bid, along with the required $1 million deposit. (Choi Decl., ¶ 43). Shortly thereafter, in December 2001, AK Capital was selected as the winning bidder, subject to certain conditions and the approval of the Bankruptcy Court. (*Id.*, ¶ 44). That approval came on March 25, 2002. (*Id.*) The next day, on March 26, AK Capital and Hanbo entered into a Memorandum of Understanding to purchase Hanbo's assets (the "Purchase MOU"). Under the terms of the Purchase MOU, along with the Amended Bidding Instructions, AK Capital was required to deposit an additional $9 million with an escrow agent, which,

together with the $1 million bidding deposit, constituted the required — and non-refundable — earnest money deposit (the "EMD"). (February 12, 2003 Sale and Purchase Agreement, p. 1, attached as Ex. 29 to June 10, 2004 Decl. of Jinsu Yune ("Yune Decl.")). On April 1, 2002, AK Capital deposited the remaining $9 million of the EMD in an escrow account in Korea.

Over the next nine months, AK Capital conducted due diligence with respect to Hanbo and began negotiating a purchase agreement. Near the end of that process, in December 2002, the Bankruptcy Court unexpectedly announced that it would not approve a draft purchase agreement unless the EMD was increased by $27.7 million. (Choi Decl., ¶ 52). After AK Capital and the Creditor Board asked the Court to reconsider, the Court agreed to an additional deposit of $17 million, payable in two installments. (Choi Decl., ¶ 56). AK Capital accepted this compromise, and promised to deposit the additional earnest money by May 12, 2003 ("the Second EMD"). This Second EMD was to be fully refundable should the parties fail to execute a final sale.

On February 12, 2003, AK Capital entered into the final Asset Sale and Purchase Agreement (the "Final SPA") for the purchase of Hanbo's assets. (SPA, attached as Ex. 18 to Choi Decl.; *see also* Choi Decl., ¶ 59). Among other things, the Final SPA required AK Capital to provide the Bankruptcy Court with proof of financing for the entire purchase price by July 1, 2003. On the day of that deadline, July 1, AK Capital approached LB Korea and asked for an extension. (Choi Decl., ¶¶ 65-72). The Trustee then submitted AK Capital's request, along with a supporting opinion from LB Korea, to the Bankruptcy Court. The Court granted the request, and on July 11, 2003, a side agreement was executed to memorialize the terms

of the extension: AK Capital was given until August 18, 2003 to deposit the balance of the purchase price, and one-half of the additional $17 million EMD was made non-refundable in the event that AK Capital missed the second deadline. (See Side Agreement, attached as Ex. 21 to Choi Decl.).

As the second deadline approached, on August 13, 2003, AK Capital again approached LB Korea to ask for an extension, this time until October 17, 2003. Although the Bankruptcy Court expressed dissatisfaction with the delay, and also had significant concerns that AK Capital would never be able to obtain the necessary financing, the Court again granted AK Capital's extension request. (Choi Decl., ¶ 78). Shortly thereafter, on August 19, 2003, a second side agreement was executed, pursuant to which AK Capital was given until November 18, 2003 to finalize payment. (Second Side Agreement, attached as Ex. 25 to Choi Decl.). As a penalty for missing the August 18 deadline, one-half of the $17 million Second EMD was "released to Hanbo." (Choi Decl., ¶ 78).

As the Bankruptcy Court feared, AK Capital would again struggle to secure financing, and would therefore request a third extension. Under the circumstances, and after concluding that AK Capital had not shown a substantial likelihood that it could obtain the required financing in a reasonable amount of time, the Court refused this third request. (Choi Decl., ¶¶ 82-88). The day after the final deadline passed, on November 19, 2003, Hanbo informed AK Capital that the SPA was terminated and collected the balance of the Second EMD as a penalty.[10]

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[10] Hanbo ultimately conducted a third international auction. INI Steel Co. and Hyundai HYSCO were the successful bidders. (Choi Supp. Decl., ¶ 7).

This lawsuit followed, along with KAMCO's motion to dismiss.

DISCUSSION

A. The FSIA Framework

As noted at the outset, KAMCO claims that it is immune from suit in this jurisdiction pursuant to the FSIA because it is a "Korean government agency charged by Korean law with aiding Korean financial institutions in danger of collapse." (Song Decl, p. 2). In making this argument KAMCO correctly points out that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355 (1993) (quotation marks and citations omitted); *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138-39 (2d Cir. 2001). KAMCO is also correct that, pursuant to 28 U.S.C. § 1604, the FSIA grants absolute immunity to "foreign states," subject to the exceptions set forth in Sections 1605 through 1607.[11] The threshold question, of course, is whether KAMCO is a "foreign state" within the meaning of Section 1604.

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[11] Sections 1605 and 1607 of Title 28 provide some exceptions to the general rule of sovereign immunity, such as (i) where a foreign state waives immunity; (ii) where a suit arises from commercial activity conducted by the foreign state in the Unites States, or where commercial activity conducted anywhere has a direct effect in the United States; (iii) in cases involving the violation of property rights in contravention of international law; or (iv) where a suit consists of counterclaims made against a foreign state that initiates litigation. 28 U.S.C §§ 1605, 1607. Only the second of these exceptions is relevant here; it will be addressed *infra*.

Section 1603(a) provides, in pertinent part, that a "'foreign state' ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) then states:

> An "agency or instrumentality of a foreign state" means any entity -
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603(b). As noted, *supra,* KAMCO is a corporation organized under the laws of the Republic of Korea, and therefore satisfies the first and third prongs of Section 1603(b). (KAMCO Act, Art. 7). With respect to the second prong, KAMCO does not assert that it is a political subdivision, or that a majority of its stock is *directly* owned by the Korean government, as is required by the Supreme Court's decision in *Dole Food Co. v.*

Patrickson, 538 U.S. 468 (2003).[12] Thus, the only way KAMCO can qualify as a "foreign state" within the meaning of Section 1604 is if it is "an organ" of the Korean government.

Several principles will guide resolution of that issue. First, the term "organ" should be interpreted broadly to reflect Congress' intent that it be "difficult for private litigants to bring foreign governments into Court, thereby affronting them." *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.,* 322 F.3d 635, 640 (9th Cir. 2003). For example, the House Report issued in connection with the FSIA provides that:

> entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

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[12] Although the Korean government owns a 42.8% of KAMCO's shares, and the KDB owns an additional 28.6% of the shares, in *Dole Food Co.* the Supreme Court held that 1603(b)(2)'s "majority ownership" clause does not allow for the "tiering" of corporate subsidiaries. This essentially means that, even if the KDB is considered to be an "agent or instrumentality" of Korea, its 28.6% stake in KAMCO cannot be aggregated with Korea's *direct* 42.8% ownership share for purposes of the majority-ownership prong of Section 1603(b)(2). *Dole Food,* at 473; *see also Filler v. Hanvit Bank,* 378 F.3d 213, 218-220 (2d Cir. 2004) (noting that *Dole Food* resolved a circuit split to hold that "tiering" is not allowed under the majority-ownership prong of Section 1603(b)(2)). For purposes of the present motion, then, *Dole Food* and *Filler* mean that the Korean government owns *at most* 42.8% of KAMCO, which is clearly not enough to satisfy the majority ownership requirement.

H.R.Rep. No. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614; *see also EIE Guam Corp.*, 322 F.3d at 640.

Second, a party claiming immunity need *not* initially establish by a preponderance of the evidence that it is an "agent or instrumentality of a foreign state" under Section 1603(b); rather, the entity need initially only make a *prima facie* showing. *Virtual Countries, Inc. v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir. 2002) ("[I]n a challenge to FSIA subject matter jurisdiction, the defendant must present a 'prima facie case that it is a foreign sovereign'") (quoting *Cargill,* 991 F.2d at 1016). Once that showing is made, the opposing party then "has the *burden of going forward* with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Cargill,* at 1016 (emphasis added); *accord Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari,* 12 F.3d 317, 325 (2d Cir. 1993), *cert. denied,* 511 U.S. 1069 (1994). Determining whether the opposing party has met this burden "involves a 'review [of] the allegations in the complaint, the undisputed facts, if any, placed before [the court] by the parties, and — if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue — [resolution of] disputed issues of fact.'" *Virtual Countries,* 300 F.3d at 241 (quoting *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 141 (2d Cir. 2001)). Finally, if that burden is met, the "ultimate burden of persuasion" shifts back to the party claiming immunity. *Cargill,* 991 F.2d at 1016 (emphasis added); *Robinson,* 269 F.3d at 141 n. 8. This final burden must be met by a preponderance of the evidence. *Id.; Virtual Countries, Inc.,* 300 F.3d at 241-42.

B. Is KAMCO an Organ?

There is no definitive test for determining whether an entity is an "organ" for purposes of Section 1603(b)(2); to the contrary, because entities that are within reach of 1603(b)(2) are likely to be quasi-governmental in character — in other words, they are likely to share characteristics both with governments or their agencies and non-governmental entities — the analysis is necessarily *ad hoc.* But that is not to say that it is without structure. To the contrary, the Second Circuit has identified several factors as relevant to the inquiry, including:

> (1) whether a foreign state created the entity for a national purpose;
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> (2) whether a foreign state actively supervises the entity;
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> (3) whether a foreign state requires the entity to hire public employees and pays their salaries;
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> (4) whether the entity holds exclusive rights to some right in a [foreign] state; and
>
> (5) whether the entity is treated as a governmental organ under the laws of a foreign state.

Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004) (*citing Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 846-47 (5th Cir. 2000)). Interestingly, the Second Circuit applied these factors in *Filler* to conclude that another Korean entity, the Korea Deposit Insurance Corporation ("KDIC"), which bears certain similarities to KAMCO, *was* an organ of a foreign state. (*Id.*).

Both sides acknowledge that the foregoing factors, as applied in *Filler,* will guide this Court's analysis of KAMCO's entitlement to FSIA immunity. Both also recognize that *Filler* invites district courts to engage in a balancing process, without particular emphasis on any given factor and without requiring that every factor weigh in favor of, or against, the entity claiming FSIA immunity. *See Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 847 (5th Cir. 2000) ("although [the five *Filler* factors] provide a helpful framework, we will not apply them mechanically or require that all five support an organ-determination"). Relying on these principles, plaintiffs argue that "it is clear that ... the FSIA ... is wholly inapplicable to insulate KAMCO from liability." (Opp. Memo., p. 12). Defendants disagree, contending that "KAMCO easily qualifies as an organ of the Korean government under [the *Filler*] factors." (Mot. to Dismiss, p. 16). In resolving the dispute, the Court will address the factors *seriatim.*

1. Was KAMCO Created For a National Purpose?

There is overwhelming evidence in the record that KAMCO was established by the Republic of Korea for a national purpose, namely, to rescue Korean financial institutions by purchasing and disposing of non-performing loans at prices in excess of what the loans would be worth on the open market. (*See, e.g.,* KAMCO Act, Arts. 1, 6). KAMCO was first established on April 6, 1962 with passage of the Korea Development Bank Act as a subsidiary of the Korea Development Bank ("KDB"). As noted, *supra,* in 1997 the Korean government passed the KAMCO Act — which expanded and redefined KAMCO's purpose — in response to the Asian financial crisis. Article I of the Act provides that

KAMCO was created for a quintessential government purpose, to "contribute to the development of the financial industry and the national economy through improving the liquidity and soundness of financial institutions." To that end, the Act gives KAMCO exclusive authority over the Resolution Fund, which is itself funded by the issuance of government-guaranteed bonds.

There can be no question that the preservation and development of the financial industry and financial markets are national goals, whether those ends are achieved by the disposition of non-performing loans or otherwise. In *EIE Guam Corp.*, for example, the Ninth Circuit held that the Japanese Resolution and Collection Corporation ("RCC") was immune from suit under the FSIA because, among other things, it was "expressly [created] to perform a public function," namely, to "purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions." *EIE Guam Corp.*, 322 F.3d at 640-41. It is undisputed that KAMCO serves an almost identical function in Korea.

Plaintiffs respond that — *even if* KAMCO was created in part to serve a national purpose — it is more like a private for-profit corporation than it is an organ of a foreign state because KAMCO has a competing purpose, to earn and distribute profits. (Pl. Opp., pp. 13-15). As described more fully above, KAMCO has some ability to earn profits and in fact earned modest profits in 2003. But distribution of those profits is significantly restricted, and any profits attributable to the re-sale of non-performing loans acquired using the Resolution Fund are not reflected in KAMCO's financial statements, and are payable to entities that contributed money to

the Resolution Fund, not to KAMCO's shareholders.[13] In any event, the Court does not consider KAMCO's limited ability to make and distribute profits necessarily inconsistent with its national purpose. That is to say, as long as KAMCO was created for and continues to serve a national purpose — which it clearly does — the Court sees no reason why KAMCO's profitability should preclude FSIA immunity. Rather, it simply means that KAMCO does not have as its *exclusive* purpose a national one. This is simply not inconsistent with the first *Filler* factor, or with the purpose of the FSIA, especially given Congress' intent that the term "organ" be interpreted broadly. Indeed, as the Ninth Circuit noted in *EIE Guam Corp.*:

> Congress' statement in the legislative history that a "state trading company" and "an export association" can be "organs" of a foreign state indicates Congress' belief that an entity's involvement in commercial affairs does not automatically render the entity non-governmental.

EIE Guam Corp., 322 F.3d at 641 (citations and internal quotation marks omitted). Neither, in this Court's opinion, should KAMCO's limited ability to make a profit, in and of itself, preclude it from being an "organ" of the Korean government. To the contrary, given the strong national purpose underlying KAMCO's creation, the Court finds that the first *Filler* factor weighs heavily in favor of the conclusion that KAMCO is an organ of the Korean government.

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[13] As noted, these loans are acquired at above market prices, which is further evidence that KAMCO's primary purpose is a public and not a private one. (Song Decl., ¶ 12).

2. Does the Korean Government Actively Supervise KAMCO?

There is substantial evidence in the record that the Korean government actively oversees and supervises KAMCO. As is more fully explained in the Court's factual findings, *supra,* Korea's Financial Supervisory Commission (the "FSC") directly supervises KAMCO, including by exercising *ex post facto* control over the election of KAMCO's CEO, as well by appointing or removing KAMCO's statutory auditor. (Song Decl., ¶ 17; KAMCO Act, Art. 47). KAMCO is also subject to audit by the National Assembly and is periodically audited and inspected by the Board of Audit and Inspection, "the government body responsible for auditing all government agencies." (*Id.*). The Government also exercises direct control over KAMCO through its presence on the Management Committee, which must pass all resolutions concerning and amendments to KAMCO's operational policies and budgets. (KAMCO Act, Art. 14.). As noted above, the Management Committee is composed of public officials from the FSS, Ministry of Planning and Budgeting, and Ministry of Finance and Economy (the "Ministry Members"). *Id.*, Art. 15.

Plaintiffs offer no real opposition to any of these points; that is to say, plaintiffs do not contend that KAMCO is *not* subject to significant government control and oversight.[14] Accordingly, the Court finds that this

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[14] In an effort to provide additional support for the second *Filler* prong, KAMCO also claims that it is subject to government control by virtue of the fact that the government is its largest shareholder. In order to make this claim, KAMCO argues that, although "tiering" cannot be used to establish majority ownership for purposes of Section 1603(b)(2), "tiered" majority ownership can bear upon the question of government oversight. That is to say, defendant argues that the Korean government has a majority stake in KAMCO,

factor also weighs in favor of the conclusion that KAMCO ought to be considered an organ of the Korean government for FSIA purposes.

3. Does the Korean Government Require that KAMCO Hire Public Employees and, If So, Does It Pay their Salaries?

There is little evidence in the record relevant to the third *Filler* factor, which asks "whether the foreign state requires the hiring of public employee and pays their salaries." *Filler*, 378 F.3d at 217. To begin, there is no evidence that the KAMCO Act requires KAMCO to "hire" public employees. At best, there is an argument that — by creating the Management Committee — the Act requires KAMCO to retain public officials to oversee its operations. But these officials are presumably not "employees" of KAMCO; nor is it entirely clear from the record that they are paid *by* KAMCO for their services, however one characterizes them. It does, however, appear that KAMCO's employees may be considered public employees for some purposes under certain Korean laws. (Yune Reply Decl., ¶¶ 12-18; Song Decl., ¶¶ 15-18). But, at the same time, it does not appear that the government actually pays KAMCO's employees' salaries. And it is not particularly relevant that under the KAMCO Act the Korean government "may, when it is deemed necessary to support the performance of KAMCO's services, make a capital investment in KAMCO or support necessary expenses."

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a position it claims to hold by virtue of its direct 42.8% ownership stake, and the KDB's 28.6% stake (collectively, 71.6%). Although not without merit, this argument adds little to the analysis given the undisputed evidence that the Korean government exercises a great deal of *direct* control over KAMCO, for example through the FSC's veto power and its role on the Management Committee.

(KAMCO Act, Art. 9(3); Reply Memo., pp. 7-9). The more pertinent question is whether KAMCO *must* hire employees that *are* paid by the government. There is no evidence that it must. Accordingly, the Court finds that the third *Filler* factor does not support the conclusion that KAMCO is an "organ" of the Korean government.

4. Does KAMCO Hold Exclusive Rights in Korea?

The fourth *Filler* factor turns on whether KAMCO holds exclusive rights in Korea. It clearly does. Under Article 9 of the KAMCO Act, KAMCO has the exclusive right to use the Resolution Fund to acquire and dispose of non-performing loans. (Song Decl., ¶ 9). Both KACMO and the Resolution Fund were created by statute and are operated to perform a public benefit. This factor therefore weighs heavily in KAMCO's favor.

5. Is KAMCO Treated as a Private or Public Entity Under Korean Law?

The final *Filler* factor — whether KAMCO is treated as an agency of the Korean government under Korean law — is the focus of plaintiffs' claim that KAMCO is not an organ of the Korean government. The thrust of plaintiffs' argument is that, for most purposes, KAMCO is treated as any "independent corporate entity under Korean law." (Opp. Memo., pp. 12-13). In support of this proposition, plaintiffs note that tort claims against KAMCO are governed not by the Korean State Compensation Act ("KSCA"), but rather by the Korean Civil Act ("KCA"), a statute which plaintiffs claim "governs *private* parties and entities." (Kim Decl., p. 19) (emphasis in original). According to plaintiffs' expert, that distinction is important because the KSCA is equivalent to the United States Federal Tort Claims Act

("FTCA"), 28 U.S.C. § 2671 *et seq.* In other words, plaintiffs argue that if KAMCO were a government agency, it would be subject to suit in Korea, if at all, pursuant to the KSCA. Finally, plaintiffs point to the fact because the government owns less than 50% of KAMCO, it is not subject to the Korean Framework Act on the Management of Government-Invested Institutions ("FAGII").

While KAMCO may be treated as a private entity in some circumstances, it is also clear that, in several others, it is treated as an agency of the Korean government under Korean law. For example, KAMCO is subject to suit under the Korean Administrative Act ("KAA") (along with other government agencies) under certain circumstances; and, contrary to plaintiffs' position, its actions can also subject the Korean government to suit under the KSCA. (Reply Memo., p. 8; Yune Reply Decl., ¶¶ 5(b), 11(a), (b), 26). Although KAMCO is not subject to the FAGII, neither is the KDIC, an entity that has been found by the Second Circuit to be an organ of the Korean government. *Filler,* 378 F.3d, at 217; (Yune Reply Decl., ¶¶ 5(a), 18). Both KAMCO and the KDIC are subject to the Korean Framework Act on the Management of Government-*Affiliated* Institutions (FAGAI), (Id., ¶¶ 5(a), 18), although, as plaintiffs note, this is true of a number of entities that may or may not be deemed to be organs of the state, such as the Korea Railway Facility Corporation. (Second Kim Decl., ¶ 27).[15]

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[15] It is entirely unclear from the *Filler* decision whether the Second Circuit considered the FAGII/FAGAI distinction in reaching its decision that the KDIC was an organ of the Korean government. In any event, the Court does not consider this fact to be critical to its finding that, based on the entire record, KAMCO is entitled to FSIA immunity.

Plaintiffs also argue that KAMCO is not an organ because KAMCO's *employees* and *officials* are considered to be private individuals under most circumstances, the acknowledged exception being certain actions under the Korean Criminal Act. (*See* Kim Decl., ¶ 70). Indeed, plaintiffs argue that "[b]ecause the KAMCO Act refers to the criminal statute while deeming KAMCO officials as 'public officials,' it also means that KAMCO officials are considered officials of private institutions in all other matters, including lawsuits" such as this one. (*Id.*). In response, KAMCO acknowledges that its officials are treated as private citizens for some purposes, but notes that its officials are also "considered by law to be officers of the Korean Tax Authority and of the Korean Customs Authority," at least when those officials are "performing auctions of property seized by those agencies and are subject to civil administrative actions in those capacities." (Reply Memo., p. 9; see also, Yune Reply Decl., ¶¶ 5(c), 11(a), (b)).

Keeping in mind that this final factor — and, indeed, this whole analysis — is not an all-or-nothing proposition, the Court draws the following conclusion from this debate. While it is certainly relevant that KAMCO officials are amendable to suit in their individual capacity for certain purposes, it is more important that they are subject to suit as government officials for other purposes because *truly private* individuals would *never* be subject to suit as government officials. The same goes for KAMCO itself — truly private corporations would never be subject to suit as a government entity, or subject the Korean government itself to suit, whether under the KAA or the KSCA. In other words, it simply does not follow that KAMCO is *not* an organ of the Korean government for purposes of FSIA immunity simply because it is subject to suit alongside private Korean corporations.

Nonetheless, it is evident that KAMCO is treated as both a public and a private entity under Korean law. For this reason, this final *Filler* factor weighs neither heavily for nor heavily against a finding that KAMCO is an organ of the Korean government.

6. Conclusion

Eschewing a mechanical application of the *Filler* factors, and considering the extensive record in its entirety, the Court concludes that KAMCO has clearly established that it is an organ of the Korean government, and is therefore immune from suit under the FSIA (unless one of the enumerated exceptions applies). KAMCO was created by statute in 1962 and modified by statute in 1997; it is largely funded by and financially dependant on the government of Korea, which directly or indirectly (through the KDB) owns more than 70% of its outstanding shares; KAMCO has exclusive control over the Resolution Fund, which is funded by government-backed bonds; it is directly supervised by the FSC, which reports to the President of Korea, as well as several other agencies of the Korean government; it is exempt from paying certain taxes, such as acquisition and securities transaction taxes, and also potentially benefits from any other tax relief that the national or local governments deem "necessary" for its welfare; its management committee is composed of officials from Korea's Ministry of Finance and Economy, Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service; and, perhaps most significantly, KAMCO has a quintessentially "public" mission, to service and stabilize the Korean economy by efficiently disposing of non-performing loans and restructuring failing corporations. *Filler*, 378 F.3d at 220 ("ensuring the stability of the South Korean banking system" is a "public

function" supporting a finding that the KDIC is an organ of the Korean government); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001) (the ultimate question for purposes of FSIA "organ" status is "whether the entity engages in a public activity on behalf of the foreign government.").

Plaintiffs' arguments to the contrary, which focus on KAMCO's ability to earn limited profits and the fact that, like private entities, it is subject in many circumstances to suit under the KCA, do not substantially alter this balance. Plaintiffs have not rebutted KAMCO's showing that, at least for some purposes, it is treated as a government agency under Korean law. And, as noted, *supra*, there is nothing in the text of the FSIA to suggest that KAMCO's ability to make a profit *ipso facto* precludes the conclusion that it is an organ of the Korean government for purposes of Section 1603(b)(2). This proposition is supported by the House Report associated with the FSIA, which indicates Congress' view that "agenc[ies] or instrumentalit[ies]" of a foreign state might take any of several forms, many of which are inherently "commercial" in nature. *EIE Guam Corp.*, 322 F.3d at 640-641. In any case, the more pertinent question is what happens to those profits. KAMCO has introduced evidence that any profits on the non-performing loans it purchases (at above market prices) are not even reflected in its financial statements; neither are they are returnable to KAMCO's shareholders, instead going to institutions that contributed money to the Resolution Fund.

The Court's conclusion that KAMCO is an organ of the Korean government is further supported by the Second Circuit's *Filler* decision. In observing that the KDIC is an organ of the Korean government, the court explained that:

> The District Court correctly concluded that the KDIC is an organ of a foreign state because the KDIC was formed by statute (the Korea Depositors Protection Act) and presidential decree, it performs functions traditionally performed by the government (protecting depositors and promoting financial stability), has its directors are [sic] appointed by the Ministry of Finance and Economy; its president appointed by the President of the Republic of Korea; and many of its operations overseen by the Ministry of Finance and Economy.

Filler, at 217. Like the KDIC, KAMCO was formed by statute and presidential decree, performs functions typically performed by the government (ensuring financial stability through the management of a public fund), has a Management Committee appointed by the government, and has many — if not most — of its operations directly supervised by the government.

C. The Commercial Activity Exception

The remaining question, then, is whether the "commercial activity" exception to FSIA immunity applies. The "commercial activity" exception is codified at 28 U.S.C. § 1605(a)(2) and provides, in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> . . .

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Plaintiffs have the burden of coming forward with evidence demonstrating that Section 1605 applies, subject to the following principles of law. *Robinson v. Government of Malaysia,* 269 F.3d 133, 141 (2d Cir. 2001).

A "foreign state" is engaged in "commercial activity" under the FSIA "when it acts not in its governmental or public role, but rather as a private player in the marketplace." *United States Fidelity and Guaranty Co. v. Braspetro Oil Services, Co.,* 199 F.3d 94, 98 (2d Cir. 1999) (*per curiam*). KAMCO does not dispute that its role in the sale of Hanbo's assets required it to engage in a "commercial activity" within the meaning of Section 1605(a)(2). So the only question is whether any of AK Capital's claims against KAMCO in this lawsuit are "based upon" (i) commercial activity that was carried out *in the United States* by KAMCO; or (ii) an act performed by KAMCO *in the United States* in connection with some extraterritorial commercial activity.[16]

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[16] AK Capital does not argue that the third possible commercial activity exception applies, which would require it to produce evidence that this action is based upon some act done by KAMCO "in connection with a commercial activity" outside of the United States that "cause[ed] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). But even if it did, the Court would find that the allegedly tortuous activity

Reading the complaint broadly, plaintiffs bring three claims against KAMCO. The first arises out of alleged misrepresentations made by KAMCO, including statements regarding (i) KAMCO's ability to control the Second Auction (Compl., ¶¶ 10, 13); (ii) KAMCO's intention to provide guidance and assistance to AK Capital in the event its bid at auction was successful (Compl., ¶ 12-13); and (iii) the total amount of earnest money that AK Capital would be required to pay in connection with the auction (Compl., ¶ 13). *See, also,* Murphy Deed, ¶¶ 13-15. Plaintiff's second claim is for conspiracy to defraud, and involves an alleged agreement between KAMCO and the Trustee to sabotage AK Capital's bid at the Second Auction so that the creditors could keep the earnest money, and so that the Trustee could bid on the assets himself. (Compl., ¶¶ 21-22). Plaintiffs' third claim — for interference with the SPA entered into between AK Capital and Hanbo — is also premised on the existence of a conspiracy between the Trustee and KAMCO in connection with the Second Auction. (Compl., ¶ 40).

Under Section 1605(a)(2), a cause of action is "based upon" commercial activity or acts performed in the United States if it includes "elements . . . that, if proven, would entitle a plaintiff to relief under his theory

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at issue in this case did not have a "direct effect" in the United States because under the terms of the proposed asset sale KAMCO was not required to perform any act in the United States. *Texas Trading v. Federal Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981) (decision to back out of contracts had a "direct effect" in the United States because the contracts required Nigeria to "present documents and collect money" here); *Shapiro v. Republic of Bolivia,* 930 F.2d 1013 (2d Cir. 1991) ("direct effect" found where Bolivia was required to issue negotiable promissory notes to an intermediary in the United States); *cf. Int'l Housing Ltd. v. Rafidain Bank Iraq,* 893 F.2d 8 (2d Cir. 1989) (no "direct effect" where parties did not direct their relationship to the United States in any tangible way).

of the case." *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993) (citations omitted). As the Second Circuit has clarified, albeit in the context of the third, "direct effect," prong of the exception:

> What does "based upon" mean? At a minimum, that language implies a causal relationship. Thus, at the least, the "act that caused a direct effect in the United States" . . . must be a "but for" cause of the . . . the ground of th[e] suit. That is, it must be true that without the [a]ct, there would be no [suit].

Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384, 390 (2d Cir. 2000) (citation omitted). This interpretation of the phrase "based upon" is equally applicable to all three prongs of the test. *Id.* (noting that "it is not enough to find that the defendant committed some act 'in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States.' We must also find that the plaintiff's suit in U.S. courts is 'based upon' that act."); *Reiss,* 235 F.3d at 747 ("there must be a significant nexus . . . between the commercial activity in [the foreign state] upon which the exception is based and a plaintiff's cause of action."). So, to meet their burden under either of the first two prongs of Section 1605(a)(2), plaintiffs must come forward with evidence that KAMCO performed acts *in the United States* that, if proven, would entitle AK Capital to relief.

They have not done so. With respect to plaintiffs' second and third claims, (conspiracy to defraud; tortious interference with contract), there is no evidence (or even any allegation) that KAMCO performed any act *in* the United States, much less an act upon which the claims are based. The record is simply silent on that point. The first claim (for misrepresentation) suffers the same defect.

Although the alleged misrepresentations are pled with greater specificity (Compl. ¶¶ 9-15), none are alleged to have occurred in the United States. Indeed, plaintiffs allege only one face-to-face meeting with KAMCO representatives in the United States, a meeting which occurred on October 13, 2000, and which had as its purpose the negotiation of a private sale of Hanbo assets to Alex Kwon. In his declaration, Murphy effectively concedes that the alleged misrepresentations were not made at this meeting. (Murphy Decl., ¶ 13). Specifically, Murphy asserts that the misrepresentations were made *after* it became clear that a private sale could not be consummated, and that the Second Auction would be held, which could not have been until well after the October 13 meeting in New York. (*Id.*).

This conclusion is not changed by the fact that, in a March 9, 2005 letter to the Court, plaintiffs' counsel describes the October 13, 2000 meeting as "pivotal," and suggests that the parties "reached an accord as to the key terms upon which AK Capital would acquire" Hanbo's assets, an accord which included the understanding that "the $10 million [EMD] . . . would be the maximum required for the transaction." (March 9, 2005 Letter from Herald Price Fahringer to the Court). To the extent this argument is applied to the alleged fraudulent inducement to bid at the Second Auction, it is directly at odds with Murphy's declaration and with the undisputed purpose of the October 13, 2000 meeting. (Murphy Decl., ¶ 12 ("[d]uring [the October 13, 2000] meeting, . . . KAMCO . . . considered a private sale of Hanbo Steel's assets to Alex Kwon")). Indeed, as of October 13, the Second Auction was not yet on the table, and AK Capital, which was formed to participate in that auction, did not even exist. (*Id.* ¶¶ 12-16).

So it simply cannot matter, as both Murphy and Cohen contend, that as a result of the October 13 meeting "it was apparent ... that KAMCO was in charge and was making all the decisions concerning the sale of Hanbo Steel." (Murphy Decl., ¶ 12; Cohen Aff., ¶ 9 ("I believe that, in the course of the October 13, 2000 meeting ... any reasonable person would have come to the conclusion that ... KAMCO ... was the real decision maker in connection with [the sale of Hanbo's assets]")). Neither could it be relevant that "the events of October 2000, ... which played out within the United States, established the rules of engagement for future dealings with Hanbo." (Cohen Aff., ¶ 10). This lawsuit is based on alleged misrepresentations (and conspiracies) that occurred *after* October 13, 2000, at an unspecified location and in connection with the Second Auction, which means that KAMCO's conduct at the October 13 meeting is a red herring. *See, e.g., Nelson,* 507 U.S. at 358, 113 S.Ct. 1471 (holding that plaintiff's claims for false imprisonment and battery in Saudi Arabia were not "based upon" the Saudi government's earlier act of recruiting him in the United States); *Human Rights in China v. Bank of China,* 2003 WL 22170648, at *5 (S.D.N.Y. Sept. 18, 2003) (action not "based upon" commercial activity in the United States where allegedly tortious communications were "performed in China" but ultimately "sent to a party within the United States"); *Kern v. Oesterreichische Elektrizitaetswirtschaft Ag,* 178 F.Supp.2d 367, 377 (S.D.N.Y. 2001) (rejecting commercial activity exception claim where "[p]laintiffs s[ought] to substitute the mere 'connection' requirement ... for the stringent nexus required by the 'based upon' language", but could not point to any act of defendant foreign sovereign occurring in the United States that gave rise to their claim); *Lord Day & Lord v. Socialist Republic of Vietnam,*

134 F.Supp.2d 549, 559 (S.D.N.Y. 2001) (finding no commercial activity exception where there was no nexus between claims and activity allegedly giving rise to the exception).

Accordingly, because there is no nexus between any acts performed by KAMCO in the United States and plaintiffs' causes of action in this case, the exceptions to FSIA immunity set forth at 28 U.S.C. § 1605(a)(2) do not permit this Court to exercise jurisdiction over KAMCO.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York
October 19, 2005

/s/ Richard J. Holwell
Richard J. Holwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 6th day of July, two thousand and six.

PRESENT:

HON. ROGER J. MINER,
HON. GUIDO CALABRESI,
HON. PAUL R. MICHEL,[1]
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
JUL 6 2006
Roseanne B. MacKechnie, CLERK
SECOND CIRCUIT

[1] The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Plaintiff-Appellant,

No. 05-5838-cv

v.

KOREA ASSET MANAGEMENT CORPORATION,

Defendant-Appellee,

AK CAPITAL LLC,

Defendant.

For Plaintiff-Appellant:

HERALD PRICE FAHRINGER (Erica T. Dubno, on the brief), Lipsitz, Green, Fahringer, Roll, Salisbury and Cambria, LLP, New York, N.Y.

For Defendant-Appellee:

DAVID W. RIVKIN (Christopher K. Tahbaz and David M. Bigge, on the brief), Debevoise & Plimpton LLP, New York, N.Y.

Appeal from a final decision of the United States District Court for the Southern District of New York (Holwell, *J.*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Jack Murphy ("Murphy"), acting on behalf of AK Capital LLC ("AK Capital"), brought the present shareholders' derivative action, contending, *inter alia,* that Defendant-Appellee Korea Asset Management Corporation ("KAMCO") fraudulently misled AK Capital during negotiations for AK Capital's purchase of the assets of the bankrupt Korean steel giant Hanbo Iron & Steel Co., Ltd. ("Hanbo"). On October 19, 2005, in a very thorough opinion, the United States District Court for the Southern District of New York (Holwell, *J.*) dismissed the action, finding that KAMCO was entitled to immunity as an "organ" of the Korean government under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2). *See Murphy v. Korea Asset Mgmt. Corp.*, 421 F.Supp.2d 627 (S.D.N.Y. 2005).

On appeal, AK Capital argues (1) that KAMCO does not in fact qualify as an organ of the Republic of Korea, because it operates as a typical independent corporation with private shareholders for whom it produces profits; (2) that KAMCO engaged in commercial activity in the United States that excepts it from FSIA immunity under 28 U.S.C. § 1605(a)(2); and (3) that the district court erred by dismissing the complaint without first conducting an evidentiary hearing relating to KAMCO's claim of FSIA immunity. We assume the parties' familiarity with the facts, the procedural history, and the specific issues on appeal.

We affirm the decision of the district court, that KAMCO qualifies as an organ of the Republic of Korea for purposes of FSIA immunity and that it was not exempted from that immunity pursuant to 28 U.S.C. § 1605(a)(2) substantially for the reasons given by the district court. AK Capital's final argument is also unavailing. AK Capital sought a broad evidentiary hearing.

The district court permitted a more limited one focused on supplementing written submissions on the question of FSIA jurisdiction. AK Capital declined that hearing as unnecessary. The decision of the district court lay well within its discretion.

We have considered Murphy's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of the Court
by: /s/ Lucille Carr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

UNITED STATES COURT OF APPEALS
FILED
AUG 28 2006
Roseanne B. MacKechnie, CLERK
SECOND CIRCUIT

Date:

Docket Number:	05-5838-cv
Short Title:	Murphy v. Korea Asset Management Corporation
DC Docket Number:	04-cv-2598
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Richard Holwell

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of August two thousand six.

Jack Murphy, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Plaintiff-Appellant,

v

Korea Asset Management Corporation,

Defendant-Appellee,

AK Capital LLC,

Defendant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jack Murphy. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/
Motion Staff Attorney

(2)

06-728

FILED

DEC 22 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

—v.—

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Court of Appeals correctly affirmed the District Court's decision that Respondent Korea Asset Management Corporation ("KAMCO") is a "government organ" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) ("FSIA"), and thus immune from suit, where the District Court found that KAMCO, among other things, was established by Korean statute for the national purpose of stabilizing the Korean economy by purchasing assets of bankrupt Korean companies, is actively overseen and supervised by the Korean government, is financed by the Korean government, is exempt from certain taxes in Korea, holds certain exclusive rights under Korean law, and is treated by Korean law as a government agency.

2) Whether certiorari should be denied where, under the governing precedents of any Court of Appeals, KAMCO would be found to be a "government organ" pursuant to the FSIA.

3) Whether the District Court's discretionary ruling granting an evidentiary hearing of limited scope, which Petitioner rejected, fails to present an issue for which certiorari should be granted.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States ("Sup. Ct. R."), Respondent Korea Asset Management Corporation ("KAMCO") states that its largest shareholder is the Republic of Korea, which owns 42.3 percent of KAMCO's shares. The Korea Development Bank, which is wholly owned by the Republic of Korea, owns 26.9 percent of KAMCO's shares. The remaining 30.8 percent of KAMCO's shares are owned by several private banks, none of which owns more than 10 percent of KAMCO's shares.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Korea Asset Management Corporation ("Respondent" or "KAMCO") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari submitted by Jack Murphy ("Petitioner"), dated November 22, 2006 ("Petition").

INTRODUCTION

This Court should not grant a writ of certiorari in this case because Petitioner fails to demonstrate how the resolution of any alleged circuit split – even if one exists – would affect the outcome of his claims given the facts underlying this controversy. Under any approach articulated to date by any circuit that has addressed the issue, KAMCO would be found a government organ under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 ("FSIA"). As the District Court correctly found, and the Court of Appeals affirmed, "KAMCO was created for a quintessential government purpose, to 'contribute to the development of the financial industry and the national economy through improving the liquidity and soundness of financial institutions.'" App. 31.[1] In addition, the District Court found that KAMCO is directly supervised by the Korean government, App. 33-34, holds exclusive rights over a fund backed by government bonds, App. 35, is largely funded by

[1] For consistency, we adopt the same citation system as Petitioner: "App. __" designates a page in the appendix to the Petition, while "A. __" indicates a page in the Joint Appendix submitted to the Court of Appeals.

and financially dependant on the Korean government, App. 38, and is majority-owned by Korea directly and through a government-owned bank, App. 38. Thus, KAMCO indisputably meets the standards for a government organ developed by the Second, Third and Fifth Circuits, respectively, as these analyses are virtually identical and would all place significant emphasis on KAMCO's "government purpose."

Moreover, assuming *arguendo* that the Ninth Circuit's application of its government-organ analysis differs from the analyses used by other circuits, as the Solicitor General and U.S. State Department have suggested in their *amicus curiae* brief in *Powerex Corp. v. Reliant Energy Servs. Inc.*, Case No. 05-85, 2006 WL 3357058 (Nov. 14, 2006) ("Solicitor General Br."), the Ninth Circuit would nonetheless undoubtedly find KAMCO to be a government organ. In fact, in *EIE Guam Corp. v. Long Term Credit Bank*, 322 F.3d 635, 640 (9th Cir. 2003), *cert. denied* 540 U.S. 1003 (2003), the Ninth Circuit affirmed that a corporation formed by the Japanese government to "purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions" – the same purpose for which KAMCO was formed – is a government organ. Petitioner has presented no argument that the Ninth Circuit would rule differently with respect to KAMCO than it did in *EIE Guam Corp.* Indeed, Petitioner does not even cite *EIE Guam Corp.*, despite the District Court's reliance upon it and its obvious relevance to this case.

Because the courts below correctly found KAMCO to be a government organ, and because the outcome of Petitioner's claims would be the same regardless of which circuit's precedents are applied, this case does not present an appropriate vehicle for this Court to address any alleged split

in circuit authority. Certiorari is therefore unwarranted in this case.

STATEMENT OF THE CASE

I. Factual Background

A. KAMCO

KAMCO is indisputably an organ of the Korean government, as the District Court found and the Court of Appeals summarily affirmed. *See* App. 38, 49. Created under Korean law in 1962 and modified by statute in 1997, KAMCO has the "quintessential government purpose" of stabilizing the Korean economy in the wake of the Asian financial crisis of the late 1990s, through the purchase of non-performing loans of bankrupt Korean companies at above-market prices. *See* App. 8-9, 31. To help KAMCO accomplish this purpose, the Korean government granted KAMCO exclusive rights over a "Resolution Fund" financed by government-backed bonds, as well as exclusive authority over the non-performing loans it purchases. *See* App. 35. Because KAMCO performs this essential government function, it is also subject to extensive state oversight. *See* App. 12, 33-34. For these reasons and others, the lower courts correctly held that KAMCO qualifies as a government organ under the FSIA and is immune from suit unless an enumerated exception applies. *See* App. 38-40, 49.

Petitioner attempts to argue around the District Court's well-supported factual findings by making several false assertions about KAMCO. *First*, Petitioner's unsubstantiated claim that "the Republic of Korea does *not* supervise KAMCO," Petition at 11 (emphasis in original), completely contradicts the findings of the District Court. Indeed, as the District Court found, KAMCO's Management

Committee must include officials from Korea's Ministry of Planning and Budgeting, the Financial Supervisory Service, the Ministry of Finance and Economy, and the Korea Development Bank – all government ministries and agencies. *See* App. 33; A. 301, 315. The District Court also found that KAMCO is subject to audit by the Korean National Assembly and the Korean Board of Audit and Inspection and that the Korean Financial Supervisory Commission exercises *de facto* control over the appointment of KAMCO's CEO. *See* App. 33. These facts led the District Court to conclude that "[t]here is substantial evidence in the record that the Korean government actively oversees and supervises KAMCO." *Id.*

Second, Petitioner incorrectly portrays KAMCO's ownership structure as dominated by private investors. *See* Petition at 11. In fact, the District Court found that the Republic of Korea effectively owns a majority of KAMCO's shares, directly and indirectly through the Korea Development Bank, which in turn is wholly-owned by the Republic of Korea. *See* App. 9.[2] The remaining minority share of KAMCO is owned by a group of private Korean banks. *See id.*

Third, Petitioner incorrectly claims that KAMCO is treated as a private entity for purposes of tort claims. *See* Petition at 11. To the contrary, KAMCO's actions can subject the Korean government to liability under the Korean State Compensation Act ("KCSA"), the Korean equivalent

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[2] At the time the District Court published its opinion, the Republic of Korea owned, directly and indirectly, 71.4% of KAMCO. *See* App. 9. Since the District Court's decision, the ownership structure of KAMCO has changed slightly; the Korean government currently owns 69.2% of KAMCO, directly and through the Korea Development Bank.

of the U.S. Federal Tort Claims Act. *See* App. 36; A. 454. KAMCO is also subject to suit under the Korean Administrative Litigation Act ("KALA"), which legislates the procedures for suing government agencies. *See* A. 459.

Fourth, Petitioner inaccurately states that the District Court found KAMCO "behaves like a typical for-profit corporation." Petition at 12 (internal quotations omitted). In fact, the District Court expressly concluded that, while some of KAMCO's activities are similar to that of a non-governmental corporation, "in many respects KAMCO ***does not*** actually operate as a 'for profit' corporation." App. 10 (emphasis added). For example, the District Court observed that KAMCO sells the non-performing loans it purchases at a substantial loss, "in effect subsidizing the holder of the bad debt." App. 10. The District Court then went on to detail the numerous other ways KAMCO functions as a government organ. *See* App. 10-13.

Finally, contrary to Petitioner's claims that KAMCO's "private shareholders earn millions of dollars each year in *profits*," Petition at 21 (emphasis in original); the District Court expressly found that KAMCO's "modest" profits from the sale of non-performing loans are "distributed to the institutions that contributed money to the Resolution Fund, not to KAMCO's shareholders." App. 10. Indeed, the District Court further noted that "the distribution of any profits arising from KAMCO's other operations is subject to further limitations not applicable to for-profit corporations." *Id.*

B. The Underlying Transaction

Petitioner similarly misstates the facts regarding the transactions underlying his derivative suit against KAMCO. Indeed, contrary to what Petitioner alleges, Petition at 8, KAMCO did not first approach Alex Kwon with an offer to sell the assets of the bankrupt Hanbo Iron & Steel Co. ("Hanbo"). Rather, in 1998, Hanbo's creditors, including KAMCO, held an international auction for Hanbo's assets open to all qualified investors. *See* App. 14. The Nabors Consortium, a financing group led by Mr. Kwon, won that initial auction, but in the fall of 2000, negotiations with the Nabors Consortium collapsed, and the Consortium withdrew from the deal. *See id.*

After this failed transaction, Mr. Kwon initiated negotiations with KAMCO for a proposed private sale of the Hanbo assets to him. *See* App. 15. As part of these negotiations, KAMCO representatives met with Mr. Kwon in New York on October 13, 2000, but contrary to Petitioner's claims, Petition at 9, KAMCO's representatives never stated that they controlled the sale of Hanbo's assets. Rather, KAMCO's representatives stated explicitly at the meeting and in a follow-up letter that any terms of a private sale were subject to approval by Hanbo's other creditors and the Bankruptcy Division of the Seoul Central District Court ("Korean Bankruptcy Court"), the court supervising Hanbo's reorganization. *See* A. 551, 553. Soon after this meeting, Hanbo's creditors rejected the possibility of a private sale to Mr. Kwon and decided instead to hold a second international auction to find a purchaser for Hanbo's assets. *See* App. 21.

After the proposal for a private sale collapsed, Mr. Kwon and Petitioner created AK Capital LLC ("AK Capital"), the alleged real party in interest in this derivative action, in order to participate in the second international auction.[3] *See* App. 20-21. Critically, as the District Court noted, all actions related to the second international auction (including all actions described in the complaint upon which this action is based) took place outside of the United States. *See* App. 43-44. AK Capital won the second international auction, and it executed a Sale and Purchase Agreement ("SPA") with Hanbo on February 12, 2003. *See* A. 42. Over the next nine months, AK Capital experienced difficulties assembling the necessary financing and requested two extensions of the SPA's financing deadline, both of which were granted. *See* A. 43-50. Despite these extensions, AK Capital failed to procure the required financing, and the Korean Bankruptcy Court refused to approve a third extension. As a result, the SPA automatically terminated, and AK Capital forfeited its $27 million earnest money deposit, in accordance with the terms of the SPA. *See* A. 49-50.

II. Proceedings Below

A. The Motion to Dismiss

Petitioner filed this derivative action in the Supreme Court for the State of New York against AK Capital and KAMCO on March 17, 2004, asserting three causes of action

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[3] Contrary to Petitioner's assertions that "[a]t the time of the October 13th meeting, AK Capital was known as AK Capital B.V.," Petition at 9, n.8, the District Court explicitly held that "there is nothing to suggest that AK Capital LLC was involved in the October 13, 2000 meeting," nor was AK Capital LLC "directly involved in Kwon's private offer to assume the Nabors SPA . . . ." *See* App. 20.

related to the second international auction and the loss of the $27 million deposit. KAMCO removed the case, under the provisions of 28 U.S.C. §§ 1441 and 1446, to the U.S. District Court for the Southern District of New York on April 5, 2004.

On June 11, 2004, KAMCO moved to dismiss on the grounds of sovereign immunity, *forum non conveniens*, failure to plead a derivative action with particularity, and failure to state a claim. The motion to dismiss was briefed by the parties during the remainder of 2004, with both sides submitting voluminous evidence in the form of declarations and documents from the transaction. *See* App. 6, fn.2.

In early 2005, during a conference call with the District Court, Petitioner requested an evidentiary hearing on the motion to dismiss. *See* A. 573. After the parties and the District Court exchanged several letters on the subject, the District Court granted Petitioner's request for a hearing, but limited the scope of that hearing to testimony supplementing the evidence already submitted on the issue of sovereign immunity. *See* A. 582. Petitioner thereafter rejected the District Court's invitation for a hearing, writing that he "concluded that there are sufficient facts before the Court to sustain our position that KAMCO is not protected by the FSIA." *Id.* Respondent agreed that a hearing was unnecessary. *See* A. 584.

On September 30, 2005, the District Court dismissed the action against KAMCO on the ground that KAMCO is a Korean government organ, and therefore immune from suit under the FSIA unless one of the exceptions to immunity enumerated in the statute applied. *See* App. 38-40. In a detailed opinion, the District Court described at great length the various attributes of KAMCO, leading to the conclusion that it was a government organ and thus qualified for

sovereign immunity. *See* App. 3-46. Significantly, in finding KAMCO a government organ, the District Court relied not only on Second Circuit jurisprudence, but also extensively on authority from the Ninth Circuit, App. 27, 31, 32, 39, and the Fifth Circuit, App. 29, 30. The District Court further found that KAMCO had not taken any action in the United States that gave rise to the complaint; thus, no exception to immunity applied under the FSIA. *See* App. 40-46. The District Court did not address the remaining asserted grounds for dismissal.

B. The Court of Appeals

Petitioner appealed to the Court of Appeals for the Second Circuit, which, after briefing and oral argument, affirmed the District Court's ruling by summary order on July 6, 2006. *See* App. 47-50. While explicitly relying on the District Court's "very thorough" analysis with regard to the finding that KAMCO is a government organ, App. 49, the Second Circuit separately addressed and rejected Petitioner's contention that he was unfairly denied a hearing, writing that "[t]he decision of the district court lay well within its discretion." App. 50.

Petitioner then filed a petition for rehearing *en banc*, which was denied on August 28, 2006. *See* App. 51-52.

C. The Related Arbitration

Shortly after KAMCO filed its motion to dismiss in this case, AK Capital, the alleged real plaintiff in interest, initiated arbitration proceedings in Hong Kong against Hanbo's Trustee, in his official capacity as representative of Hanbo. Although AK Capital chose to name a different defendant in the arbitration, AK Capital made nearly identical claims to those Petitioner seeks to assert

derivatively in this action. *See* A. 393. The case was heard by an arbitral tribunal (after extensive discovery and witness submissions) in December 2005. In July 2006, the arbitral tribunal rendered its decision, dismissing all of AK Capital's claims.

It is therefore preposterous for Petitioner – a derivative plaintiff – to decry the "extreme consequences . . . resulting in the dismissal of his complaint," and to assert hysterically that "a terrible injustice has been done to a United States citizen and a domestic company." Petition at 24. AK Capital, the real party in interest in this case, has had its claims fully adjudicated by an esteemed group of international arbitrators, making Petitioner's derivative action (and appeals) entirely unnecessary.

REASONS FOR DENYING THE PETITION

I. Certiorari Should Be Denied Because Resolution of the Alleged Circuit Conflict Would Have No Bearing on the Outcome of this Case.

Certiorari is ordinarily denied in cases where the resolution of the alleged conflict in authority is irrelevant to the ultimate outcome of the action before this Court. *See* Robert L. Stern, et al., SUPREME COURT PRACTICE § 4.4, at 231 (8th ed. 2000) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). As this Court observed in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation."

In this case, even assuming *arguendo* that Petitioner correctly identifies a clear and intolerable split in circuit authority regarding the proper approach to determining government-organ status under the FSIA, resolution of this

conflict would have no bearing on Petitioner's claims, since KAMCO would be held to be an organ of a foreign state under any of the relevant circuit standards. As such, a grant of certiorari is not warranted.

A. KAMCO is an Organ of a Foreign State Under Second, Third and Fifth Circuit Precedents.

The Courts of Appeals for the Second, Third and Fifth Circuits have all adopted nearly identical standards for determining whether an entity is a government organ under the FSIA. *See* Solicitor General Br. at *8. In *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004), the Second Circuit adopted the standard articulated by the Fifth Circuit in *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000), *cert. denied* 531 U.S. 979 (2000), which described five factors relevant to a court's determination of whether an entity is an "organ of a foreign state" under the FSIA:

> *(a)* whether the foreign state created the entity for a national purpose;
>
> *(b)* whether the foreign state actively supervises the entity;
>
> *(c)* whether the foreign state requires the hiring of public employees and pays their salaries;
>
> *(d)* whether the entity holds exclusive rights in the foreign state; and
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> *(e)* how the entity is treated under foreign state law.

The Third Circuit utilizes the same factors, and adds two more gleaned from the Ninth Circuit's decision in *Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003): the circumstances surrounding the entity's creation, and the entity's ownership structure. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied* 541 U.S. 903 (2004). The other circuits have not articulated these as formal factors, but consider them in practice. *See, e.g.*, *Filler*, 378 F.3d at 216 ("The KDIC is a Korean governmental institution created by [statute] and a presidential decree."); *Kelly*, 213 F.3d at 847 ("Syrian Petroleum Company was established according to Syrian law . . . and it is owned entirely by the Syrian government.").

In each of the Second, Third, and Fifth Circuits, the factors enumerated provide a framework for determining an entity's status, but courts generally do "*not* apply them mechanically or require that all five support an organ-determination." *Kelly*, 213 F.3d at 847 (emphasis in original); *see also USX*, 345 F.3d at 208 (emphasizing "flexible approach" to organ analysis); App. 38 (eschewing "a mechanical application of the *Filler* factors"). Moreover, as the Solicitor General writes, these courts "understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is 'an entity that engages in activity serving a national interest and does so on behalf of its national government.'" Solicitor General Br. at *9 (citing *USX*, 345 F.3d at 209).[4]

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[4] Incredibly, Petitioner describes the "national purpose" factor as "minor," Petition at 22, despite the fact that this prong is given substantial weight under the relevant precedents. *See, e.g.*, *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807.

After a full description of KAMCO's attributes, App. 8-13, the District Court balanced each of the five factors outlined in *Filler* and *Kelly*. *See* App. 29-38. Ultimately, the District Court concluded, and the Second Circuit affirmed, that KAMCO is a Korean state organ because it was:

> [C]reated by statute in 1962 and modified by statute in 1997; it is largely funded by and financially dependant on the government of Korea, which directly or indirectly (through the KDB) owns more than 70% of its outstanding shares; KAMCO has exclusive control over the Resolution Fund, which is funded by government-backed bonds; it is directly supervised by the FSC, which reports to the President of Korea, as well as several other agencies of the Korean government; it is exempt from paying certain taxes, such as acquisition and securities transaction taxes, and also potentially benefits from any other tax relief that the national or local governments deem 'necessary' for its welfare; its management committee is composed of officials from Korea's Ministry of Finance and Economy, Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service; ***and, perhaps most significantly, KAMCO has a quintessentially 'public' mission, to service and stabilize the Korean economy by efficiently disposing of non-performing loans and restructuring failing corporations.***

App. 38-39 (emphasis added).

This holding is consistent with other appellate decisions in the Second, Third and Fifth Circuits examining state organs that engage in commercial transactions for government purposes.[5] *See Filler*, 378 F.3d at 220 (finding the Korea Deposit Investment Company engaged in a "public function" by "ensuring the stability of the South Korean banking system"); *USX*, 345 F.3d at 211 (endorsing lower court's finding that state-owned insurance company was an organ of Irish state where entity was owned indirectly by the government to "serve[] an important governmental interest, namely protecting the Irish insurance and banking industries from financial disaster"); *Kelly*, 213 F.3d at 848 (finding Syrian oil company to be a state organ where entity was created for a "national purpose," several "high-level Syrian government officials" were board members of the entity, and the entity had "exclusive rights to explore and develop Syria's identified petroleum reserves").

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[5] Although Petitioner implies that corporations should never be immune under the FSIA, Petition at 14, these cases are in keeping with the legislative history of the FSIA, which makes clear that commercial concerns can be considered government agencies or instrumentalities:

> [E]ntities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

B. KAMCO Is an Organ of a Foreign State Under Applicable Ninth Circuit Authority.

Although the Solicitor General has argued that, in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), the Ninth Circuit deviated from the other circuits by analyzing organ status in a mechanical fashion while failing to give appropriate weight to the public purpose of the entity at issue in that case, Solicitor General Br. at *9 12, KAMCO would clearly be a government organ under Ninth Circuit authority as well. As such, resolving any alleged circuit conflict would not affect the outcome of this case. Indeed, although Petitioner attempts to argue his case using the circuit conflict identified by the Solicitor General and the U.S. State Department in *Powerex*, he does not even attempt to show how adoption of the Ninth Circuit's analysis – or, indeed, *any* circuit's analysis – would alter the outcome in this case.

In reality, the Ninth Circuit's standard is closely analogous to the standards employed in the other circuits. In *Patrickson*, 251 F.3d at 807, the Ninth Circuit held:

> In defining whether an entity is an organ, courts consider whether the entity engages in public activity on behalf of the foreign government. In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.

As articulated, this approach significantly overlaps with the standards used by the Second, Third and Fifth Circuits. *See Filler*, 378 F.3d at 217; *USX*, 345 F.3d at 208; *Kelly*, 213 F.3d at 847-48.

Application of this analysis to KAMCO would lead to the same result reached in the Second Circuit: a finding that KAMCO is a government organ.[6] In fact, in *EIE Guam Corp.*, the Ninth Circuit, applying the *Patrickson* "government organ" standard, found an entity quite similar to KAMCO – the Japanese Resolution and Collection Corporation ("RCC") – to be a government organ. The similarities between KAMCO and the RCC are striking:

- KAMCO and the RCC were created for almost identical national purposes. *Compare* App. 30 (finding KAMCO's national purpose is "to rescue Korean financial institutions by purchasing and disposing of non-performing loans at prices in excess of what the loans would be worth on the open market") *with EIE Guam Corp.*, 322 F.3d at 640 (observing that "the Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese

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[6] Petitioner's reliance on the "spirit" of this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), Petition at 2, is misplaced, as that case did not address the government-organ standard, but instead addressed only whether an entity must be majority-owned directly by a foreign state to qualify as an "instrumentality" under the second prong of 28 U.S.C. § 1603(b). Courts writing after *Dole* have noted that while the ownership test outlined in *Dole* is a bright-line rule, the government-organ analysis should remain a flexible standard. *See, e.g.*, *USX*, 345 F.3d at 208 (finding that FSIA text "suggests the need for a more flexible approach under the organ prong of section 1603(b)(2) than the Court adopted in *Dole* with respect to the ownership prong of that section").

financial system [namely] to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions") (internal quotation omitted).

- Both KAMCO and the RCC have exclusive authority under foreign state laws to perform many of their functions. *See* App. 35 ("KAMCO has the exclusive right to use the Resolution Fund to acquire and dispose of non-performing loans."); *EIE Guam Corp.*, 322 F.3d at 640 ("[M]any of the RCC's activities are performed exclusively by the RCC . . . .").

- KAMCO and the RCC are both substantially funded by their parent governments. *See* App. 11-12 (finding that the Korean state "can assume KAMCO's debts, pay its employees, or provide any other financial support it deems necessary"); App. 38 (finding that KAMCO is "largely funded by and financially dependent on the government of Korea"); *EIE Guam Corp.*, 322 F.3d at 640 (endorsing lower court's finding that "the RCC is funded by the Japanese government").

- Also, as did the District Court below in this case, the Ninth Circuit considered arguments against a finding that the RCC is a government organ, including "that the RCC is a private company that is engaged in a primarily commercial concern . . . that the RCC's employees are not civil servants; and that the RCC is not a public corporation . . ." *Id.* at 641. Nonetheless, the Ninth Circuit held that the "key assertion" was the RCC's public purpose, and held that, "[o]n balance, the relevant factors weigh in favor of a conclusion that the RCC is an organ of Japan." *Id.*

Given its holding in *EIE Guam Corp.*, the Ninth Circuit would surely apply its government-organ analysis in favor of KAMCO and find it to be, like the RCC, a government organ. Indeed, the District Court below relied extensively on the holding in *EIE Guam Corp.*, as it noted that "it is undisputed that KAMCO serves an almost identical function in Korea" as the RCC in Japan. App. 31; *see also* App. 27, 32, 39. The District Court below also relied on the Ninth Circuit's decision in *Patrickson* for the proposition that "the ultimate question for purposes of FSIA 'organ' status is 'whether the entity engages in a public activity on behalf of a foreign government.'" App. 38-39.

Moreover, even under the Ninth Circuit's allegedly "mechanical" approach to determining government-organ status in *NRG Energy*, KAMCO would be found to be a government organ. In *NRG Energy*, the Ninth Circuit held that although there was "some evidence that [Powerex] serves a public purpose," Powerex's "high degree of independence from the government of British Columbia;" its "lack of financial support from the government;" and "its lack of special privileges or obligations under Canadian law dictate holding that Power[e]x is not an organ of British Columbia." 391 F.3d at 1026. In sharp contrast to these findings, the District Court below not only found that KAMCO serves a "quintessential" government purpose, but also that it is closely supervised by the Korean government, is financially dependent on the government, and holds exclusive legal rights in Korea. App. 38. Thus, far from being "in direct conflict," as Petitioner claims, Petition at 2, this case and *NRG Energy* are easily reconciled since KAMCO undoubtedly qualifies as a government organ under the *NRG Energy* ruling.

In summary, assuming for the sake of argument that there are substantive differences between the manner in which the different circuits determine whether an entity is a government organ, such differences would not affect the outcome in this case. Under the relevant authorities of all circuits in question, including the Ninth Circuit, KAMCO is a government organ. Therefore, the Petition should be denied.

C. The Ninth Circuit's Decision in *NRG Energy v. California* Does Not Create a Circuit Conflict.

At most, the *NRG Energy* ruling represents a misapplication of the Ninth Circuit's government-organ analysis, limited to the facts of that case. Indeed, the actual standard articulated by the Ninth Circuit in *NRG Energy* is essentially identical to the standards used by other circuits. *See NRG Energy*, 391 F.3d at 1026 (applying factors outlined in *Patrickson*, while emphasizing the "ultimate question" of "whether the entity engages in a public activity on behalf of the foreign government"); *see also* Solicitor General Br. *8 (conceding that the standards among the circuits are very similar in their formal articulation). In fact, the circuits largely seem to have borrowed their approaches from each other: the Fifth Circuit approach in *Kelly*, which formed the basis for the Second Circuit's approach in *Filler*, was itself derived from Ninth and Third Circuit precedents. *See Kelly*, 213 F.3d at 846-47 (citing *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) and *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997)). The Third Circuit, in *USX*, molded its approach from the Fifth Circuit in *Kelly* and the Ninth Circuit in *Patrickson*. *See* 345 F.3d at 209.

Despite these parallels in circuit precedent, the Solicitor General argues that the Ninth Circuit's "application" of its government-organ standard in *NRG Energy* – applying the standard mechanically and deemphasizing the national purpose prong of the analysis – creates a circuit conflict. *See* Solicitor General Br. at *9. However, any misapplication of the Ninth's Circuit's approach is limited to its decision in *NRG Energy*. In *EIE Guam Corp.*, for example, the Ninth Circuit gave weight to the "key assertion" of public purpose and engaged in a balancing test among the different factors to determine "government organ" status under the FSIA. 322 F.3d at 641. In *Patrickson*, the Ninth Circuit similarly gave weight to the public purpose prong, but found that the company in question was "acting to maximize profits rather than pursue public objectives."[7] 251 F.3d at 808. In *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995), the Ninth Circuit balanced a number of factors to conclude that a corporation that performed the public purpose of marketing hogs from a particular Canadian province was a government organ.

Thus, while the Solicitor General argues that a circuit conflict is evidenced by the Ninth Circuit's failure to give proper weight to the public purpose factor and its "mechanical" application of the factors in *Powerex*, Solicitor General Br. at *9-10, in fact the Ninth Circuit's decision in *NRG Energy* appears to have been merely a failure to follow

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[7] *Compare* App. 10 (finding that KAMCO "negotiates prices that are substantially in excess of what the loans are worth on the open market – in effect subsidizing the holder of the bad debt").

its own precedents in *EIE Guam Corp.*, *Patrickson*, and *Gates*.[8]

D. The Second Circuit's Summary Order in This Case Does Not Create a Circuit Conflict.

Even if there is an actual split in authority among the circuits regarding the proper approach to determining government-organ status, the decision below – a summary order – will never actually conflict with any other circuit decision. Under the Second Circuit's Interim and Proposed Permanent Rule ("2d Cir. Int. R.") 0.23(b), "rulings by summary order do not have precedential effect." Moreover, no summary order filed before January 1, 2007 can be cited in any case other than the case in which the order was entered, a related case, or for the purposes of *res judicata* or collateral estoppel. 2d Cir. Int. R. 0.23(c)(2).

Thus, the Second Circuit's summary order in KAMCO is not an appropriate vehicle for repairing any alleged circuit conflict.

II. The Court of Appeals Correctly Affirmed the Ruling That KAMCO Is an Organ of the Korean Government.

In its order affirming the District Court's thorough and well-reasoned decision finding KAMCO to be an "organ of a foreign state," the Court of Appeals properly adhered to

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[8] To the extent that the Ninth Circuit's precedents are in apparent conflict with each other, such intra-circuit disputes do not generally provide grounds for exercise of this Court's certiorari jurisdiction. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

accepted precedent regarding the determination of organ status under the FSIA, eliminating any need for this Court to exercise its supervisory power. *See* Sup. Ct. R. 10(a).

As discussed above, *supra* at 13-15, the District Court fully analyzed the five factors articulated by the Second Circuit in *Filler* when determining whether an entity qualifies as an organ of a foreign state under the FSIA:

- Applying the first *Filler* factor – whether the entity was created for a national purpose – the District Court found that "there is ***overwhelming evidence in the record*** that KAMCO was established by the Republic of Korea for a national purpose," namely, to rescue Korean financial institutions by purchasing non-performing loans at above-market prices and repackaging and selling them on the domestic and international markets. *See* App. 30 (emphasis added).

- With regard to the second *Filler* factor – whether the foreign state actively supervises KAMCO – the District Court found that "[t]here is substantial evidence in the record that the Korean government actively oversees and supervises KAMCO." App. 33; *see also* App. 12-13.

- Although the District Court found that the third *Filler* factor – whether the foreign state requires the hiring of public employees and pays their salaries – did not support an organ determination in favor of KAMCO, the District Court also observed that "[t]here is little evidence in the record relevant" to this factor. App. 34.

- With respect to the fourth *Filler* factor – whether KAMCO holds exclusive rights in Korea – the District Court correctly found that KAMCO "clearly" holds exclusive rights over the Resolution Fund and the non-

performing loans it acquires, and thus concluded that this factor "weighs heavily in KAMCO's favor." App. 35.

- Finally, the District Court found the fifth *Filler* factor – whether KAMCO is treated as a public entity under Korean law – to be equivocal. *See* A-38. However, the District Court correctly recognized that for many purposes, KAMCO is treated strictly as a government organ, and added:

> Keeping in mind that this final factor – and, indeed, this whole analysis – is not an all-or-nothing proposition, the Court draws the following conclusions from this debate. While it is certainly relevant that KAMCO officials are amenable to suit in their individual capacity for certain purposes, it is more important that they are subject to suit as government officials for other purposes because *truly private* individuals would *never* be subject to suit as government officials. The same goes for KAMCO itself – truly private corporations would never be subject to suit as a government entity, or subject the Korean government itself to suit, whether under the [KALA] or the KSCA. In other words, it simply does not follow that KAMCO is *not* an organ of the Korean government for purposes of FSIA immunity simply because it is subject to suit alongside private Korean corporations.

App. 37 (emphasis in original).

Correctly "eschewing a mechanical application," the District Court weighed these factors and concluded that "KAMCO has clearly established that it is an organ of the Korean government." App. 38. This analysis in no way departed from the usual course of judicial proceedings, and does not mandate use of this Court's supervisory powers. *See* Sup. Ct. R. 10(a).

III. There Is No Important Question of Federal Law Presented by the Facts of this Case.

Although the resolution of any alleged material circuit conflict regarding analyses used to determine "government organ" status may be important, the outcome of this case would not be affected by such a resolution, for the reasons outlined above. *See supra* at 11-22. Thus, the Petition, which requests relief based on the facts of this case, presents no important question of federal law for this Court to adjudicate. *See* Sup. Ct. R. 10(a), (c).

Similarly, Petitioner provides no evidence for his alarmist proposition that without Supreme Court intervention, "[s]ince foreign firms can easily claim to be organs of their local governments, they will continue to strategically exploit the immunity provided under the FSIA and to cannily elude the jurisdiction of our courts." Petition at 20. When the Solicitor General and the U.S. State Department, in their *Powerex* amicus brief, argue that the issue presented therein "is an important, recurring, and sensitive one," their concern is not that U.S. citizens will be abused by foreign corporations, but rather that the Ninth Circuit's decision in *NRG Energy* will undermine the critical protections of foreign government organs enshrined in the FSIA. *See* Solicitor General Br. at *6. This case, however, presents no such danger, as the courts below correctly found KAMCO to be a government organ.

IV. The District Court's Discretionary Ruling Regarding an Evidentiary Hearing Was Correct and Does Not Give Rise to an Issue Worthy of Review by this Court.

There is no issue for this Court to review with regard to the limited hearing that was granted by the District Court but rejected by Petitioner. *See supra* at 8. As recognized by the Second Circuit, the decision to limit the scope of the proposed hearing (or even to have the hearing at all) was entirely within the discretion of the District Court, and the District Court did not abuse that discretion in light of the declarations and documents submitted by the parties. *See* App. 50; *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) ("[T]he district court should consider all the submissions of the parties and ***may*** hold an evidentiary hearing, if it considers such a hearing is warranted, in resolving the question of jurisdiction.") (emphasis added).

More importantly, Petitioner has not even attempted to explain how this discretionary ruling is at odds with Supreme Court precedent or demonstrates a conflict among the circuits. *See* Sup. Ct. R. 10(a). Indeed, Petitioner does not even cite a case in this portion of his Petition. *See* Petition at 22-25. Nor does Petitioner identify an important federal question presented by the District Court's discretionary ruling. *See* Sup. Ct. R. 10(a). Finally, Petitioner cannot reasonably argue that the District Court's grant of his request for a hearing – albeit on limited terms – "so far departed from the accepted usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

It would therefore be inappropriate to grant certiorari to address the District Court's discretionary grant of a hearing in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 06-728

In the

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Certiorari Should be Granted Because this Case, Taken in Tandem with the Pending Petition in *Powerex*, Perfectly Frames the Issues that Currently Divide the Circuits and Adds the Critical Component of Private Ownership

The question presented by this Petition, and that of the pending *Powerex* Petition,[1] which the *Solicitor General has strongly recommended that the Court grant*, are closely allied. Both questions address, from different perspectives, what should be the appropriate test for deciding whether a foreign company is an "organ" of its government, thus entitling it to immunity under the Foreign Sovereign Immunities Act.

Using one application of the FSIA's "organ of a foreign state" provision, the *Ninth Circuit*, in *Powerex*, held that a Canadian company, which is *wholly*, albeit indirectly, owned by *Her Majesty the Queen* in "right of" the Province of British Columbia, is *not* immune from suit under the *Foreign Sovereign* Immunities Act. However, using a different application, the *Second Circuit*, in our case, determined that a Korean company, which has more than 30% of its stock owned by *private banks*, and is in large part controlled by private interests, *is* immune from suit under the very same act.[2] Thus, by

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[1] *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85.

[2] For example, as detailed in our opening brief, the Ninth Circuit disregarded substantial evidence that the defendant "serves a public purpose" because it "did not conform with the result indicated by the court's mechanical application of other specified factors." *See* Solicitor General's Brief as Amicus Curiae at 10, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006). But, adopting a contrary stance, the Second Circuit found that the "strong national purpose" underlying KAMCO's creation "weighs

granting Certiorari in *both* cases, the Court will have the contrasting views from two prominent circuits, which have reached opposite conclusions by applying their own tests, on this issue of statutory construction.

As stated by the Solicitor General, this question is an "important, recurring, and sensitive one that warrants this Court's consideration."[3] Moreover, the Solicitor General correctly emphasized that a "critical divergence" exists in the way the circuits apply their tests concerning whether a foreign company is an "organ" of a foreign state.[4]

These two Petitions, when considered collectively, balance and better inform the issues through their strikingly different perspectives. This Court has traditionally granted certiorari in multiple cases where, as here, they present closely related issues.[5]

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heavily in favor of the conclusion that KAMCO is an organ of the Korean government" (App.32).

[3] *See* Solicitor General's Brief at 8, *Powerex* (No. 05-85).

[4] *Id.* at 9. Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

[5] For example, in *United States v. Booker* and *United States v. Fanfan*, Nos. 04-104 and 04-105, 543 U.S. 220, 229 (2005), certiorari was recently granted from the First and Seventh Circuits where incompatible conclusions had been reached and the cases presented both sides of the same question. Hearing the two suits together allowed the Court to fully explore the matter and issue a more complete decision. *See also Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*, Nos. 03-892 and 03-907, 543 U.S. 426 (2005)(certiorari granted to resolve conflict as to whether fees paid to attorneys in contingency cases constitute income); *Landgraf v. USI Film Products* and *Rivers v. Roadway*

Moreover, our Petition adds to the resolution of this question the crucial component of *private ownership*, left open by this Court's recent decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which is not at issue in *Powerex*. While the Queen of England indirectly owns *100% of Powerex*, in sharp contrast, there is a considerable measure of *direct, private ownership* and control of KAMCO. This, of course, is a leading dynamic in gauging whether a foreign company is truly an organ of a foreign government. Thus, this difference between our case and *Powerex* warrants review of both viewpoints.

Resolution of the Circuit Conflict is Essential to Lend Stability to an Expanding Area of Litigation

As foreign companies continue to pour into our country, the persistent confusion that exists in the circuits over such an important issue, as immunity from suit, is intolerable. What is even worse, Petitioner was never afforded his day in court concerning his $27 million fraud claim simply because he was located on the wrong side of the significant divide that has opened in the circuits over this chronic question.

Express, Inc., Nos. 92-757 and 92-938, 511 U.S. 244 (1994)(addressing conflict among the Fifth and Sixth Circuits as to whether the Civil Rights Act of 1991 applied retroactively); *Environmental Protection Agency v. California* and *Hancock v. Train*, Nos. 74-1435 and 74-220, 426 U.S. 200 (1976) (resolving question as to whether federal installations were required to adhere to state permit programs). This list is illustrative only.

We urge that this Court should determine if Petitioner has the right to litigate his claim in the same way as plaintiffs in the Ninth Circuit. And, local or parochial preferences of the Second and Ninth Circuits must yield to the superior force of a national rule that lends stability and certainty to an area of growing litigation. It is virtually conceded that the variations in the tests employed by the different circuits are becoming more and more pronounced. What is needed is for this Court to intervene and establish *one set of standards* to be uniformly applied throughout the nation.

In an effort to safeguard the immunity it acquired in this case, KAMCO erroneously claims that resolution of the existing conflict would not affect the outcome of this case because it "would be held to be an organ of a foreign state under any of the relevant circuit standards."[6] However, that is simply not true. Rather, if this action had been brought in the Ninth Circuit, KAMCO would not have acquired immunity under that circuit's different standards.[7] For example, the Ninth Circuit reasoned that since Powerex "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any

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[6] Brief in Opp. at 10-11.

[7] KAMCO acknowledges that the Third Circuit considers two additional factors that are not even part of the Second Circuit's test. *See* Brief in Opp. at 12. Thus, it is apparent that a conflict exists even between the Second and Third Circuits, as well as the Ninth Circuit.

regulatory power," it was not immune from suit under the FSIA. *California v. NRG Energy Inc.*, 391 F.3d 1011, 1026 (9th Cir. 2004), *cert. filed*, sub nom. *Powerex Corp. v. Reliant Energy Service, Inc.*, No. 05-85, 74 U.S.L.W. 3050 (July 15, 2005).

The same is true here. Government appointees do *not* run KAMCO. It is operated by its own private Management Committee, which includes an *elected* Director, as well as other individuals *drawn from the private sector* (A.315-17). Similarly, KAMCO is *not* staffed with civil servants. The district court recognized that there is no evidence that KAMCO must hire employees that are paid by the government (App.34-35).

Moreover, the Korean government does not wholly own KAMCO. Rather, *private banks own nearly one third of its shares*. *See* Brief in Opp. at ii. And, its officials are not immune from tort actions in Korea. Rather, they are "*considered to be officials of a private institution*" in lawsuits arising out of torts committed by KAMCO (A.367)(emphasis supplied). Therefore, the resolution of this matter was directly affected by the conflicts in law of the circuits.

Counsel for KAMCO also claims that the Solicitor General is wrong in his carefully reasoned *amicus* brief in *Powerex*, when he urges that this Court should resolve the conflict that is rampant across the circuits. *See* Brief in Opp. at 20-21. However, there is absolutely no way the decision in *Powerex* can be reconciled with the Second Circuit's order in this case.

Furthermore, KAMCO criticizes Petitioner for not citing *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003), rather than the Ninth Circuit's *subsequent* decision in *Powerex*. *See* Brief in Opp. at 2. But, there was no need to cite to distinguishable and earlier authority from that same circuit.[8]

"The Fact that the Court of Appeals' Order Under Challenge Here is Unpublished Carries No Weight in our Decision to Review the Case"

KAMCO also incorrectly states that the summary order in this case is "not an appropriate vehicle for repairing" any conflict among the circuits because it is unpublished.[9] However, this claim is meritless. This Court has explicitly stated, the "fact that the Court of Appeals' order under challenge ... is *unpublished carries no weight in our decision to review the case.* The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (emphasis supplied).[10]

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[8] And, contrary to KAMCO's contentions, the "existence of an intracircuit conflict" *is* sufficient to warrant review by this Court, especially where, as here, the conflict relates to a recurring and important issue and is accompanied by a widespread conflict among the circuits. *See* Robert L. Stern & Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002).

[9] Brief in Opp. at 21.

[10] Significantly, in *Massaro v. United States*, No. 01-1559, 538 U.S. 500 (2003), this Court granted certiorari and unanimously reversed a similarly unpublished order involving a conflict between the Second and Seventh Circuits. There, the Court chose an *unpublished*

Moreover, here, the *district court*'s lengthy decision, upon which the Second Circuit relied, *is* published and sets a dangerous precedent that warrants review. *See Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627 (S.D.N.Y. 2005). (App. 3-46). Thus, this case presents an ideal platform to resolve the conflict between the Second and Ninth Circuits.

Additionally, KAMCO seeks to divert the Court from the serious legal issues presented by this case by suggesting that Petitioner has misstated facts about KAMCO. Brief in Opp. at 3. But, any *factual* disputes — which truly have no bearing on the legal questions at issue — derive from conflicting expert affidavits submitted by both sides.[11]

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order as the proper means to resolve a recurring issue relating to ineffective assistance of counsel claims.

[11] For example, KAMCO claims that its actions can subject the Korean government to liability under the Korean State Compensation Act ("KCSA"), which is purportedly the Korean equivalent of the U.S. Federal Tort Claims Act. Brief in Opp. at 4-5. However, the record establishes that KAMCO officials *are* "considered to be *employees of a private institution*" in lawsuits arising from torts committed by KAMCO (A.367) (emphasis supplied). Similarly, according to a well-respected Korean legal expert, the fact that KAMCO is subject to oversight by the Financial Supervisory Commission ("FSC") "indicates that KAMCO is *not* a government organ" because it is not included in the listing of "government agencies or organs" that are subject to such audit inspections (A.567) (emphasis supplied).

The Issues Presented by this Case are Compelling, Especially Since Korea Will Soon be Our Nation's Largest Free Trade Agreement Partner

Powerex, as an amicus curiae in this action, mistakenly suggests that "concerns of international comity do not support a grant of certiorari" in this case.[12] However, nothing is further from the truth. This case presents considerable and sensitive issues relating to international commerce. For example, the Office of the United States Trade Representative recently reported that the Republic of Korea is the "world's tenth largest economy." Moreover, it is this country's "seventh largest goods trading partner and our seventh largest export market." These startling statistics lend enormous force to our issues.

In fact, the Office reveals that Korea will be our *largest* Free Trade Agreement partner in 15 years.[13] As a consequence, it is plain that there is a desperate need to address issues relative to the evolving and important relationship between the United States and the Republic of Korea, as well as the inevitable effects on American companies that are harmed by Korean businesses.

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[12] *See* Powerex Corp. Brief as Amicus Curiae at 5, in *Jack Murphy v. Korea Asset Management Corp.*, No. 06-728 (Dec. 22, 2006).

[13] *See FTA: United States and Republic of Korea Economic and Strategic Benefits*, Office of the United States Trade Representative, Trade Facts, Feb. 2006, available at *http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file582_8880.pdf.*

Finally, despite the recurring nature of this pressing issue, counsel for Powerex resists review in our case based upon a claim that the issue was waived. However, they are wrong. The district court's decision, which was endorsed by the Second Circuit, addressed, at length, what constitutes an organ or instrumentality under the Foreign Sovereign Immunities Act even though the court conceded that there is "no definitive test" to make this determination. *See* App.29.

Moreover, in the district court and on direct appeal, Petitioner was bound by the Second Circuit's decision in *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004), which established the Second Circuit's test for organ status under the FSIA. But, in our Petition for Rehearing *En Banc*, which was the first opportunity to challenge the propriety of the *Filler* test, we clearly disputed those factors.[14] Irrespective, this Court is fully authorized to review a question of this magnitude.[15]

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[14] *See* Petition for Rehearing at 11, in *Jack Murphy v. Korea Asset Management Corp.*, No. 05-5838-cv (2d. Cir. July 20, 2006) ("[i]n the wake of *Filler*, this is the very first case where this Court has been called upon to consider whether those factors should apply to a foreign company that is treated as a private entity under the law of its own country. We urge it is not necessary to address the *Filler* factors when the foreign state does *not* treat the defendant as an organ of its government").

[15] *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (Court exercised its discretion to consider important question advanced in petition for certiorari and fully briefed by both sides); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (interests of judicial administration served by addressing the merits of a recurring issue that was not presented in the district court or the court of appeals).

Conclusion

For all the foregoing reasons, as well as those raised in the original petition, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

December 28, 2006

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DEC 2 2 2006

No. 06-728

IN THE

Supreme Court of the United States

JACK MURPHY, INDIVIDUALLY
AND AS A MEMBER OF AK CAPITAL LLC, ETC.,
Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR POWEREX CORP. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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December 22, 2006

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No. 06-728

JACK MURPHY, INDIVIDUALLY
AND AS A MEMBER OF AK CAPITAL LLC, ETC.,
Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, Powerex Corp. ("Powerex") moves for leave to file the accompanying brief as *amicus curiae* in support of respondent. Neither petitioner nor respondent consented to the filing of the brief, necessitating this motion.

Powerex is the petitioner in two pending cases that present a question of the proper legal standard to be applied in determining whether a foreign entity is an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(2) ("FSIA"). *See Powerex Corp. v. Reliant Energy Servs., Inc.*, No. 05-85 (filed July 15, 2005); *Powerex Corp. v. California ex rel. Lockyer*, No. 05-584 (filed Nov. 4, 2005). Powerex thus has a substantial interest in this Court's resolution of that important question, which has divided the federal courts of appeals. *See* Brief for the United States as *Amicus Curiae* at 8-13,

Powerex Corp. v. Reliant Energy Servs., Inc., Nos. 05-85 & 05-584 (filed Nov. 14, 2006) (discussing the conflict in the courts of appeals and the importance of the issue).

The petition in this case purports to raise that issue. But, for numerous independent reasons, this case is an inappropriate vehicle in which to resolve the circuit conflict over the interpretation of the FSIA organ prong. Those reasons include the following: petitioner has not argued that the court below applied an incorrect legal standard; he would lose even under the Ninth Circuit's organ-status test, which is more favorable to his position; petitioner contends that there is not a properly developed factual record; and petitioner seeks review of an unpublished summary order of the Second Circuit.

Powerex's petitions present superior vehicles for resolving the circuit conflict identified by the United States in its invitation brief in Nos. 05-85 and 05-584. In this brief, Powerex compares and contrasts this case and No. 05-85 and explains why the Court should grant certiorari in No. 05-85 instead of this case. In so doing, Powerex debunks two supposed vehicle problems raised by the respondents in No. 05-85 – namely, that No. 05-85 is moot and that 28 U.S.C. § 1447(d) bars appellate review in that case. Both assertions are false. That case is not moot, nor will it become moot before the end of the 2006 Term. And § 1447(d) is inapplicable in No. 05-85. That provision bars review of remand orders only when there is a defect in removal procedure or a lack of subject-matter jurisdiction. There was neither in No. 05-85. The entire case was properly removed – both procedurally and jurisdictionally – by parties whose right to remove was undisputed.

Powerex should be granted leave to file the attached *amicus* brief.

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December 22, 2006

QUESTION PRESENTED

Whether the Court should grant certiorari to review the court of appeals' unpublished summary order affirming the district court's application of settled circuit precedent interpreting the Foreign Sovereign Immunities Act of 1976 to the facts of this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* 1

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28 U.S.C. § 1442 12

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W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 7

14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (3d ed. 1998) 12, 13

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

ARGUMENT

I. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

For at least six independent reasons, this case presents an unsuitable vehicle for resolving the question presented. First, petitioner does not argue that the court of appeals applied the wrong legal standard, and, in any event, he has waived any such argument. Second, even under the Ninth Circuit's test for organ status, respondent Korea Asset Management Corporation ("KAMCO") qualifies as an organ of the government of Korea. Third, petitioner contends that this case lacks a properly developed factual record, which, if true, would limit the guidance the Court could provide in this case. Fourth, this petition arises from an unpublished summary order of the Second Circuit. Fifth, the foreign-relations concerns motivating review in Nos. 05-85 and 05-584 are absent here. Sixth, even if petitioner could overcome KAMCO's immunity defense under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), his suit has no merit as a matter of law because it is an improper derivative action.

A. Petitioner Has Waived A Challenge To The Legal Test For Organ Status

Petitioner has neither presented nor preserved an argument that the Second Circuit committed an error on a point of law warranting this Court's review. In this Court, petitioner's principal complaint is with the manner in which the lower courts *applied* the Second Circuit's standard for determining whether a foreign entity is an organ of a foreign state under the FSIA. *See* Pet. 21.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

(And he concedes that the Second Circuit applies essentially the same standard as do the Third and Fifth Circuits. *See* Pet. 19 n.14.) Petitioner does not contend that the Second Circuit should have adopted a different legal standard, such as the test created by the Ninth Circuit in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), *petition for cert. pending*, No. 05-85 (filed July 15, 2005). Nor does he contend that he would have prevailed under that standard. Moreover, petitioner has waived any argument that the Second Circuit employed the wrong test because, in his brief in that court, he argued exclusively that the district court misapplied the Second Circuit's test. *See* Pet'r C.A. Br. 18-21, 25-35.

B. Petitioner Would Not Prevail Even Under The *NRG Energy* Test

Even if the petition could be construed as a request for this Court to adopt the restrictive, mechanical test established by the Ninth Circuit in *NRG Energy*, petitioner would not benefit from this Court's adoption of that test. KAMCO is plainly an organ of the Republic of Korea under both of the prevailing approaches to organ status (*i.e.*, the contextual standard that governs in the Second, Third, and Fifth Circuits and the rigid standard applied in the Ninth Circuit). In *NRG Energy*, the Ninth Circuit held that Powerex's "high degree of independence from the government of British Columbia"; its "lack of financial support from the government"; and "its lack of special privileges or obligations under Canadian law *dictate[d]* [the] holding that Power[e]x is not an organ of British Columbia." 391 F.3d at 1026 (emphasis added). Here, the district court found that KAMCO satisfied all three of the criteria that the Ninth Circuit found dispositive in *NRG Energy* in findings of fact that are subject to review for clear error.

First, the district court found that KAMCO is not highly independent from the Korean government. Instead, the Korean government actively supervises KAMCO. *See* Pet. App. A12-A13, A33-A34. Among other things, the Korean

Financial Supervisory Commission – which is an agency of the Korean government reporting directly to the nation's president – has the authority to appoint and to remove KAMCO's auditor and to approve or to reject the KAMCO shareholders' choice to be the firm's managing director. *See id.* at A12. The Commission also reviews the Resolution Fund's books at the end of each fiscal year. *See id.* Government officials from the Ministry of Finance and Economy, the Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service, which is the executive arm of the Financial Supervisory Commission, sit on KAMCO's Management Committee, which initiates all changes to KAMCO's operational and budget policies. *See id.* at A12-A13. Furthermore, under certain circumstances, KAMCO is subject to the Korean Framework Act on the Management of Government Affiliated Institutions ("FAGAI"), under which its management objectives, business plans, and budgets are subject to adjustment and review by the Korean government. *See id.* at A13. Multiple agencies of the Korean government exercise supervisory authority over KAMCO's administration of the Resolution Fund – namely, the Public Fund Oversight Committee of the Ministry of Finance and Economy, and the auditing authority of the Korean National Assembly's Board of Audit and Inspection, which is responsible for auditing all agencies of the Korean government. *See id.* at A12.

Second, the district court found that KAMCO receives significant financial support from the Korean government. The government initially financed the Resolution Fund, which KAMCO administers, largely from the proceeds of government-guaranteed bonds. *See id.* at A9. Furthermore, under Korean law, the government may guarantee the repayment of debentures issued by KAMCO. *See id.* at A11. And it can make capital investments in KAMCO or support KAMCO's expenses, meaning that the government "can assume KAMCO's debts, pay its employees, or provide any other financial support it deems necessary." *Id.* at A12.

Third, the district court found that Korean law affords KAMCO substantial special privileges and imposes important obligations. KAMCO's privileges include the exclusive right to use the Resolution Fund to acquire and to dispose of non-performing loans held by Korean financial institutions. *See id.* at A35. Moreover, KAMCO is exempt from certain national and local taxes. *See id.* at A11. When acquiring non-performing loans through the Resolution Fund, KAMCO has the obligation to consult with government authorities and to pay above-market prices for those loans – "in effect subsidizing the holder of the bad debt." *Id.* at A10. Further, KAMCO does not account for any profits and losses generated by those loans on its books; all profits are remitted to the bondholders who financed the Resolution Fund. *See id.* Additionally, KAMCO is subject to suit as a governmental agency under the Korean Administrative Act, and its employees are subject to liability as governmental officials under the Korean Criminal Act. *See id.* at A36.

In sum, even under the rigid standard adopted by the Ninth Circuit in *NRG Energy*, the conclusion of the district court in this case that KAMCO is an organ of the Korean government under the FSIA would be sustained. This case is therefore a poor vehicle for resolving the circuit conflict over the legal standard to be applied in reviewing claims of organ status under the FSIA, because, under any available standard, the result would be the same.

C. The Factual Record Is Disputed

This case is also a poor vehicle because a dispute exists over whether the factual record is properly developed. In this Court, petitioner asserts that the district court erred in failing to hold a hearing on the FSIA issues. *See, e.g.*, Pet. 22 ("[T]he district court dismissed the complaint without even conducting a hearing to settle the critical factual and legal disputes that flared among conflicting experts' affidavits regarding application of the Foreign Sovereign Immunities Act."), 24 ("Here, the factual and

legal issues in dispute could not be readily resolved from the written submissions."). Although KAMCO disagrees that the district court erred in resolving KAMCO's motion to dismiss without a live hearing, under *petitioner's* view of this case, further factual development is necessary to ascertain the facts on which any determination of KAMCO's status as a foreign sovereign must be based. Thus, even if this Court were to conclude that the Second Circuit applied an incorrect legal standard, the case would have to be remanded for additional factual development. A case that raises the legal test for organ status on an undisputedly closed evidentiary record would be a better vehicle to resolve the question presented because it would permit the Court both to articulate and to apply the proper legal standard for determining organ status. Such a case, which is presented in No. 05-85, would provide the best guidance to foreign sovereigns in organizing their affairs and to the bar in litigating FSIA organ-status questions in United States courts.

D. The Second Circuit's Judgment Is A Non-Precedential Summary Order

Additionally, this case is an undesirable vehicle for this Court's review because the court of appeals' decision in this case is an unpublished summary order. Ordinarily, this Court eschews reviewing unpublished decisions of the courts of appeals because they lack precedential value in the court that issued them. *See* 2d Cir. R. § 0.23 (unpublished summary orders "shall not be cited or otherwise used in unrelated cases before this or any other court"). Here, petitioner asks this Court to review a summary order affirming a comprehensive district court decision. Although this Court occasionally reviews decisions in unpublished orders, there is nothing extraordinary about this case that might warrant such unusual treatment.

E. No Issue Of Foreign Relations Is Presented Here

Unlike Nos. 05-85 and 05-584, concerns of international comity do not support a grant of certiorari in this case. In

Nos. 05-85 and 05-584, the governments of Canada, British Columbia, and the United States have all filed briefs urging this Court to grant review and to reverse the Ninth Circuit, in part because of the substantial foreign-relations problems posed by the Ninth Circuit's rejection of Powerex's sovereign status. The foreign-affairs concerns implicated in those cases are not present here, where the foreign entity prevailed in the lower courts and, in any event, would not face litigation in state court. (Petitioner did not move to remand this case, and he does not dispute that, if KAMCO were not an organ of a foreign state entitled to a federal forum under the FSIA, complete diversity would exist to support jurisdiction under 28 U.S.C. § 1332(a)(2). *See* Pet'r C.A. Br. 1.) If anything, diplomatic concerns weigh against review here, because in this case and *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004), the Second Circuit has vindicated claims of sovereignty by Korean governmental entities.

F. Petitioner's Suit Is An Improper Derivative Action

Finally, resolution of the question presented is irrelevant to the outcome in this case. Petitioner purports to bring this suit as a derivative action on AK Capital's behalf. *See* Pet. 3, 10. But it is well-settled that a corporate shareholder, such as petitioner, cannot bring a derivative action unless the corporation itself has failed to take any appropriate action to remedy the alleged wrong.[2] Here, AK Capital is currently prosecuting an arbitration arising out of the same facts that form the basis of petitioner's derivative action. *See* Resp. C.A. Br. 20-21. Because AK Capital has sought to enforce its legal rights, petitioner

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[2] *See, e.g.*, 19 Am. Jur. 2d *Corporations* § 1946 (2006) ("A shareholder derives the power to pursue a derivative action from the unexercised authority of the corporation; thus, a derivative action may be brought *only if the corporation*, because it is controlled by the wrongdoers or for other reasons, *fails or refuses to take appropriate action* for its own protection.") (emphases added; footnote omitted).

cannot enforce those same rights.[3] Thus, even in the unlikely event that the FSIA issues were to be decided against KAMCO, petitioner's suit would still have to be dismissed as an improper derivative action. Because the FSIA organ-status inquiry would appear to be ultimately irrelevant to the outcome of this case, the Court should resolve the conflict over organ status in a case such as No. 05-85, where the resolution of the conflict will be of continuing significance to Powerex.

II. *POWEREX v. RELIANT ENERGY SERVICES, INC.*, No. 05-85, IS A GOOD VEHICLE FOR RESOLVING THE CONFLICT IN THE CIRCUITS

The respondent-plaintiffs in No. 05-85 have identified two purported problems with that case as a vehicle for resolving the important circuit conflict – which has now been recognized by the United States[4] – over the interpretation of the FSIA's organ prong. First, those plaintiffs have asserted that No. 05-85 is or will soon be moot. Second, they have contended that 28 U.S.C. § 1447(d) bars appellate review in that case because the district court remanded the case to state court.

Neither of those supposed vehicle problems presents an obstacle to this Court's review. The case is not moot, nor will it become moot before this Court could decide it. Furthermore, § 1447(d) does not apply in No. 05-85. The case was properly removed by two federal agencies and an undisputed foreign sovereign. Thus, there was neither a defect in removal procedure nor a lack of subject-matter jurisdiction, meaning that the remand order was not one of the kinds of remand orders to which § 1447(d) applies. In

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[3] It is irrelevant that AK Capital is pursuing its rights against a different defendant – Hanbo Steel's bankruptcy trustee – particularly in light of the settled rule that an injured party is entitled only to one full recovery. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 330-31 (5th ed. 1984).

[4] *See* Brief for the United States as *Amicus Curiae* at 8-12, *Powerex Corp. v. Reliant Energy Servs., Inc.*, Nos. 05-85 & 05-584 (filed Nov. 14, 2006) ("U.S. Br.").

any event, § 1447(d) does not prohibit appellate review of a district court's rejection of a foreign entity's FSIA claim simply because that ruling accompanies a remand order.

Finally, Powerex notes one point that has not been disputed by the respondents in Nos. 05-85 and 05-584: Powerex's status as an agency or instrumentality of a foreign state entitled to the protections of the FSIA is a recurring issue with tremendous significance for the bilateral diplomatic and economic relationship between the United States and Canada.

A. No. 05-85 Is Not Moot

As the United States correctly concluded in its brief, a live controversy in No. 05-85 will continue while objections to the state-court approvals of the class-action settlement are litigated in the California appellate courts. *See* U.S. Br. 20 ("[T]he petition is not now moot, and this Court would almost certainly resolve the case before the settlement between the plaintiff and respondent cross-plaintiffs becomes final."). That appellate process has only just begun and, even if all objections are rejected, it will not run its course until well after the conclusion of O.T. 2006.

1. No. 05-85 arises out of consolidated actions originally filed in California state court by plaintiffs (respondents there) against a number of defendants (also respondents there), including Reliant Energy Services, Inc. *See* No. 05-85 Pet. App. 7a. Reliant brought cross-claims against Powerex and others. *See id.* The plaintiffs and Reliant have entered into a settlement agreement. And Reliant has agreed with the other cross-defendants – but not with Powerex – to have the cross-complaints dismissed. But those dismissals, moreover, are subject to a significant qualification – the cross-complaints will be reinstated if the settlement between the plaintiffs and Reliant is not finally approved by the state courts. Powerex has not agreed to a dismissal on those terms, and Reliant's cross-claims against Powerex have not been dismissed.

The state trial court has approved the settlement between the plaintiffs and Reliant, over objections. Two of the objecting parties – the State of Montana and a private individual – have appealed the state trial court's approval of the settlement. If either of those parties prevails on appeal, the settlement could unravel, the plaintiffs could re-assert their claims against Reliant, and Reliant could pursue its cross-claims against Powerex.[5]

2. The appeals almost certainly will not be resolved before the end of O.T. 2006. Currently, the briefs of the appellant-objectors are due just before and after January 1, 2007, and Montana has requested an extension of 30 days within which to file its brief. If Montana's extension request is granted and the appellees obtain no extensions on their briefs, then briefing would be completed in mid-to-late March 2007. *See* Cal. R. Ct. 8.212(a) (answering brief due 30 days after the opening brief; reply brief due 20 days after the answering brief). Under the state appellate court's normal practice, the oral argument would be expected to occur in mid-to-late May, with a decision by the California court of appeals within one month (mid-to-late June). We understand, however, that California courts routinely grant extensions of up to 75 days to file appellate briefs. *See* Cal. R. Ct. 8.212(b); *id.* 8.220(a), (d). If some or all of the parties obtain extensions, then that timeline would be extended by weeks or months. A decision by a California court of appeal does not become final until 30 days after the decision is filed. *See id.* 8.264(b)(1).

Once the California appellate court's decision is final, the parties will have 10 days to seek review of that decision by the California Supreme Court. *See id.* 8.500(e)(1).

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[5] Thus, the respondent-plaintiffs in No. 05-85 rightly do not contend that the case is actually moot. *See* Response of Plaintiffs and Respondents to Brief for the United States as *Amicus Curiae* at 3, No. 05-85 (filed Nov. 27, 2006) ("While counsel for Plaintiffs would relish the opportunity to argue a case before the Court, the *policy underlying the doctrine of mootness counsels against* a grant of review in this case.") (emphasis added).

The California Supreme Court generally must grant or deny any petition for review within 60 days of its filing, although that court may extend the time for consideration of a petition for up to 30 days. *See id.* 8.512(b). Even if no petition for review is filed, the California Supreme Court may grant review on its own motion up to 90 days after the appellate court's decision becomes final – in other words, up to four months (or 120 days) after the decision is issued. *See id.* 8.512(c).

When the California Supreme Court accepts a case for review, briefing takes approximately 80 days, without any extensions. *See id.* 8.520(a). After the briefs are filed, the justices circulate memoranda among themselves articulating their positions on the case.[6] When a majority of the justices have agreed on a tentative resolution of the case, the case is set for oral argument.[7] The court ordinarily issues a decision within 90 days of oral argument.[8] Decisions of the California Supreme Court generally become final 30 days after the opinion is filed, and the court may extend that time for an additional 60 days. *See id.* 8.532(b).[9]

Accordingly, even under the most expeditious timetable provided under the regular application of the state-court rules of appellate procedure, it is highly unlikely that the settlement will become final before the end of this Term.

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[6] *See* Internal Operating Practices and Procedures of the California Supreme Court, Part VI, *available at* http://www.courtinfo.ca.gov/courts/supreme/documents/sc082504.pdf.

[7] *See id.*

[8] *See id.*, Part X.

[9] The overall settlement comprises two settlements with separate classes: a settlement with a class of California consumers and a settlement with a class of non-California consumers. Reliant brought claims against Powerex in the California case only. Although the respondent-plaintiffs in No. 05-85 claim in their response to the Solicitor General's brief (at 3 n.2) that Montana lacks standing to appeal the approval of the California settlement, the plaintiffs have not asserted that the California appellate court will resolve that issue on a different timetable than the one we have set forth above.

This Court could therefore be assured that its resolution of No. 05-85 would not be hindered by any threat of actual mootness of the underlying case.

B. Section 1447(d) Does Not Bar Appellate Review In No. 05-85

1. As the United States has recognized, the court of appeals in No. 05-85 correctly rejected the plaintiffs' contention that 28 U.S.C. § 1447(d) bars appellate review of the district court's determination that Powerex is not an organ of a foreign state under the FSIA. *See* No. 05-85 Pet. App. 9a-10a; U.S. Br. 14-19. Section 1447(d) states that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). This Court has held that § 1447(d)'s bar of appellate review applies only to cases remanded under § 1447(c), which authorizes remand when, at the time of removal, there is a defect in removal procedure or lack of subject-matter jurisdiction. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995).

In No. 05-85, there was neither a defect in removal procedure nor a lack of subject-matter jurisdiction. At a minimum, that case was properly removed by the British Columbia Hydro and Power Authority ("BC Hydro"), the Bonneville Power Administration ("BPA"), and the Western Area Power Administration ("WAPA"). *See* No. 05-85 Pet. App. 7a-8a.[10] It has been undisputed throughout the litigation that BC Hydro is an agency or instrumentality of a foreign state under the FSIA and that BPA and WAPA are federal agencies. As an agency or instrumentality, BC Hydro was statutorily entitled to remove the *entire* action (not just the claims against it) to federal court under the FSIA, 28 U.S.C. § 1441(d). *See* No. 05-85

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[10] Indeed, the district court correctly recognized that "the actions were properly removed in the first instance." No. 05-85 Pet. App. 20a.

Pet. App. 10a (citing *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990)); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729.1, at 239-41 (3d ed. 1998) ("Wright & Miller") (§ 1441(d) "permits the removal of the entirety of any state court action at the discretion of the foreign state") (citing cases). Independently, the federal-officer removal statute, 28 U.S.C. § 1442, authorized BPA and WAPA to remove the entire suit to federal court. *See, e.g., Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) ("'[I]t is settled that the filing of a petition for removal [under § 1442] by a single federal officer removes the entire case to the federal court.'") (quoting *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir. 1965)); *see also* 14C Wright & Miller § 3727, at 166-68, 171.

Furthermore, the district court did not lose jurisdiction once it resolved the federal issues presented by BC Hydro's, BPA's, and WAPA's defenses of sovereign immunity.[11] Instead, the court had discretion to decide the remaining claims in the case or to remand them to state court.[12] Consequently, when the district court remanded

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[11] *See District of Columbia v. MSPB*, 762 F.2d 129, 132-33 (D.C. Cir. 1985) (per curiam) ("If the federal party is eliminated from the suit after removal under [§ 1442], the district court does not lose its ancillary or pendent-party jurisdiction over the state law claims against the remaining non-federal parties."); 14C Wright & Miller § 3727, at 171 (§ 1442 "creates a species of statutorily mandated ancillary subject matter jurisdiction over the claims" against non-federal-officer defendants); *id.* § 3729.1, at 239-43; *see also Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 715 (9th Cir. 1990) ("Once a federal court acquires removal jurisdiction over a case, it also acquires jurisdiction over pendent state claims. Dismissal of the federal claims does not deprive a federal court of the power to adjudicate the remaining pendent state claims.") (citation omitted).

[12] *See District of Columbia*, 762 F.2d at 133 (when the federal officer is eliminated from the case, "the district court retains the power either to adjudicate the underlying state law claims or to remand the case to state court") (citations omitted); 14C Wright & Miller § 3727, at 171 ("[T]he district court can exercise its discretion and decline jurisdiction over the ancillary claims once the federal agency has dropped out of the case."); *id.* § 3729.1, at 242-43 (when case is removed by a foreign

the case to state court, it was not for a lack of subject-matter jurisdiction or a defect in removal procedure.[13] Therefore, the district court's remand order was not authorized by § 1447(c), and § 1447(d) thus does not bar appellate review of that order. *See Thermtron*, 423 U.S. at 345-46 (reviewing and reversing an unauthorized remand order); *Quackenbush*, 517 U.S. at 712-13 (discretionary abstention-based remand order reviewable on appeal); 14C Wright & Miller § 3740, at 534-36 (noting that courts of appeals have interpreted *Thermtron* to permit review of remand orders where the district court had discretion to hear or to remand the claims).

2. In any event, § 1447(d) does not apply in Nos. 05-85 and 05-584 for an additional and independent reason: Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right under the Act to a bench trial in federal court and to subject that sovereign to a jury trial in state court. FSIA remand orders are different from ordinary remand orders in that they resolve more than the right to a federal forum. *See* U.S. Br. 20 n.13 (making this point). When a district court rules that a foreign entity is not an agency or instrumentality of a foreign state under the FSIA, the entity loses the important right to have its case tried to the bench, rather than a jury.[14] Congress granted the right to a bench trial in the

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state under § 1441(d), district court has discretion to remand claims against other defendants).

[13] *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988) (§ 1447(c) "do[es] not apply to cases over which a federal court has pendent jurisdiction"). Although the district court mistakenly stated that it was remanding for lack of subject-matter jurisdiction, this Court has jurisdiction to determine whether the district court properly labeled its reason for remanding as falling within § 1447(c). *See* U.S. Br. 19 n.12 (citing cases).

[14] The right to a bench trial in federal court after removal is contained in § 1441(d), which provides that "*[u]pon removal* the action shall be tried by the court without jury." 28 U.S.C. § 1441(d) (emphasis added). In state court after a remand, nothing entitles the entity to avoid a jury trial, even if the state court were to disagree with the

FSIA because "[a]ctions tried by a court without jury will tend to promote a *uniformity in decision* where foreign governments are involved." H.R. Rep. No. 94-1487, at 13 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611-612; *see Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000) (explaining that the "FSIA seeks to provide uniformity in the treatment of foreign sovereigns and to remove any local bias that might be present at a jury trial in a state court"). Congress concluded that suits against foreign sovereigns must be decided in a uniform manner because "a disparate treatment of cases involving foreign governments may have *adverse foreign relations consequences*." H.R. Rep. No. 94-1487, at 13 (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6611. Considering that paramount need for uniformity and the special right to a bench trial that is at stake in FSIA foreign-state-status determinations, Congress could not have intended those rulings to be unreviewable on appeal merely because they accompany an order of remand.[15]

C. No. 05-85 Presents A Case Of Special Concern To Canada, The United States' Largest Trading Partner

Finally, Powerex reiterates the extraordinarily important and sensitive foreign-affairs concerns weighing in favor of granting review in No. 05-85. The Federal Government of Canada and the Province of British Columbia have demonstrated the importance of this issue by submitting highly unusual certiorari-stage *amicus* briefs in support of Powerex's petition. The United States Government's recommendation that certiorari be granted is a reflection of the weighty diplomatic concerns at issue in

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federal court's determination that the entity is not an agency or instrumentality of a foreign state. *See Martinelli v. Djakarta Lloyd P.N.*, 431 N.Y.S.2d 748, 749 (N.Y. Civ. Ct. 1980) (no "section of the FSIA limits the power of state courts to try actions against foreign states to a jury").

[15] Because § 1447(d) does not apply in No. 05-584 either, it would be appropriate for the Court to grant review in that case as well as No. 05-85 and to consolidate the two cases for briefing and argument.

that case. *See* U.S. Br. 13 (explaining that the proper interpretation and application of the FSIA "is particularly important" in Powerex's cases).

No. 05-85 has been pending in this Court for more than 17 months, while Powerex has been forced to litigate cases in California state courts, a result contrary to Congress's intent in enacting the FSIA. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983) (explaining that, in enacting the FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts"). If the Court does not act expeditiously, plaintiffs will continue to haul Powerex into state courts in the Ninth Circuit. Unlike respondent KAMCO, which does not appear to be a repeat player in litigation in the United States, Powerex is one of the largest suppliers of electricity to Western States and can reasonably be expected to defend litigation in this country. For that reason as well, No. 05-85 is a better vehicle than this case because this Court's guidance as to Powerex's sovereign status would be helpful to Canada, the Province, and future litigants. Continued denial of Powerex's right to remove those cases under the FSIA, in turn, raises the specter of bringing the United States into non-compliance with its obligations under the North American Free Trade Agreement. *See* No. 05-85 Pet. 26-27.

By expeditiously granting review in No. 05-85, the Court can avoid serious diplomatic concerns that would be raised by resolving the current circuit conflict in this case rather than in No. 05-85. If the Court were to hold Powerex's petitions, grant this petition, and then grant, vacate, and remand in Powerex's cases after resolving this case, Powerex would be forced to return to the Ninth Circuit. The Ninth Circuit likely would then order additional briefing (and possibly oral argument) and issue a decision in the ordinary course. Thus, Powerex would have to litigate for perhaps two additional years or more before its right to a federal forum under the FSIA would be vindicated. Granting review in No. 05-85 now would avert that

development and the accompanying strain on the United States' relationship with its largest trading partner.

CONCLUSION

The petition for a writ of certiorari in No. 05-85 should be granted. The petitions for a writ of certiorari in this case and in No. 05-584 should be held pending resolution of No. 05-85 and then disposed of as appropriate in light of the disposition of that case. If the Court grants the petition in No. 05-85 and reverses the Ninth Circuit, it should deny the petition in this case.

Respectfully submitted,

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In the

Supreme Court of the United States

JACK MURPHY, individually and as a member of AK Capital LLC, suing on behalf of himself and all other members of AK Capital LLC similarly situated and in the right of AK Capital LLC,

Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,

Respondent,

AK CAPITAL LLC,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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INTRODUCTION

Petitioner Jack Murphy respectfully moves this Court for an order (1) vacating its denial of his petition for a writ of certiorari, entered on June 25, 2007, and (2) granting the petition to review a Second Circuit decision in which a Korean company defrauded an American citizen and his company out of $27 million. The Korean firm was permitted to escape liability for its fraudulent actions under the Foreign Sovereign Immunities Act of 1976 ("FSIA").[1] The following *intervening circumstances* of a substantial effect warrant rehearing under the mantle of Rule 44(2):

1. **THIS COURT GRANTED CERTIORARI IN *POWEREX CORP. v. RELIANT ENERGY SERVICES, INC.* WHILE JACK MURPHY'S PETITION WAS PENDING YET NEVER ADDRESSED THE MERITS OF THE ISSUE — DESCRIBED BY THE SOLICITOR GENERAL AS AN "IMPORTANT, RECURRING, AND SENSITIVE ONE THAT WARRANTS THIS COURT'S CONSIDERATION" — BECAUSE OF PROCEDURAL DEFAULTS IN *POWEREX***

Our petition for certiorari urged the Court to settle the profound issue that has ignited the alarming and ever-widening split in the Circuits over what standard should be applied under the Foreign Sovereign

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[1] Pursuant to Supreme Court Rule 29.6, AK Capital LLC is a limited liability company organized under the laws of the State of Delaware. It has no parent company or subsidiaries, and there are no publicly held companies that own 10% or more of the corporation's stock. Jack Murphy is a former United States Congressman who served in the United States Army during the Korean War (A.373).

Immunities Act to gauge whether a corporation is an "organ" of a foreign government and, thus, is entitled to the radical relief of being forever immunized from suit in this country for damages caused by its tortious and wrongful conduct.[2]

While this petition was still pending, on January 19, 2007, the Court granted certiorari in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, to decide that issue. The Solicitor General warned that the common question, posed by *both* cases, is an "*important, recurring, and sensitive one that warrants this Court's consideration.*" And, he pleaded with this Court to definitively decide this preeminent question, which has proven to be of an enduring nature.[3]

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[2] Pursuant to 28 U.S.C. § 1603(b)(2), an "instrumentality" of a foreign state is any entity which is an "*organ* of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof" (emphasis supplied). The term "organ" is not defined in the statute. And, this Court has "never addressed the meaning or application" of what constitutes an instrumentality of a foreign sovereign under that provision. *See* Solicitor General's Brief as Amicus Curiae at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006).

[3] *See* Solicitor General's Brief as Amicus Curiae at 8, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006) (emphasis supplied).

Despite the Solicitor General's appeal, on June 18, 2007, this Court disposed of *Powerex* on procedural grounds.[4] Thus, the government's considerable concerns have been left *unresolved*. As a consequence, the intensity of the FSIA issue, presented by our petition, remains contentious and ripe for resolution. Moreover, our case is not handicapped by the procedural disability that enjoined the resolution of the *Powerex* petition.

The principal casualty of this unsettled issue is the growing uncertainty concerning what constitutes an organ of government under the FSIA. This continues to be a cause of deep anxiety for all Americans who regularly do business with foreign companies but have no definitive forum for rectifying any injury done to them by these corporations.[5]

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[4] The majority held that there was no jurisdiction, under 28 U.S.C. § 1447(d), for the federal appellate court to review the district court's decision remanding the matter back to the state court from which it was removed. *See Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85, 127 S. Ct. 2411, 75 USLW 4437 (June 18, 2007). Justices Breyer and Stevens *dissented and would have addressed the abiding FSIA question.*

[5] *See* "Supreme Court Refuses to Rule on Whether Powerex is a Foreign Sovereign Immune from Domestic Suit, Citing Procedural Faults of 9th Circuit Ruling," *Foster Electric Rep.* 8 (June 27, 2007), available at 2007 WLNR 12566534.

Likewise, foreign governments and their instrumentalities have a paramount interest in seeking a uniform construction of the law concerning their level of liability, under the FSIA, for wrongful conduct.[6] This unpredictability is bound to lead to a torrent of litigation in the highly sensitive field of international relations.

Finally, recognizing the vital nature of this issue, the Solicitor General stressed that a "*proper understanding* of the 'organ' prong is of *considerable significance* under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status."[7]

We respectfully submit that consideration of this matter — through rehearing of our petition for certiorari — is urgently needed in this pivotal case, which provides a competent and ideal vehicle for resolving a perennial issue that, if not attended to now, will only grow worse and worse over time.

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[6] For example, the Canadian government underscored that "[i]n order to properly exercise their powers, foreign sovereigns need predictability with respect to the way United States courts interpret the FSIA's applicability to entities created by sovereigns and conducting activities on their behalf." *See* Government of Canada's Brief as Amicus Curiae at 6, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Aug. 17, 2005).

[7] *See* Solicitor General's Brief as Amicus Curiae at 13, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (emphasis supplied). *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), held that to qualify as an "instrumentality" under § 1603(b)(2), the foreign state must directly own a majority of the corporation's shares.

2. INTERVENING AND CONFLICTING DECISIONS FROM THE APPELLATE COURTS UNDERSCORE THE NEED FOR FINAL RESOLUTION OF THIS PERSISTENT PROBLEM, WHICH IS OF INTERNATIONAL CONCERN

We believe that by granting certiorari in *Powerex*, this Court sought to settle the open question of what standards should be used to judge whether a foreign corporation is an organ of government. This mounting controversy will persist until finally put to rest. In fact, while our petition was pending, these very issues were again pushed to the forefront when they erupted in the Fifth Circuit. *See Board of Regents of University of Texas System v. Nippon Telephone & Telegraph Corp.*, 478 F.3d 274 (5th Cir. 2007). There, the Fifth Circuit complained that there is "no 'clear test' for determining organ status." *Id.* at 279.

In finding that Japan's telecommunications company was *not* a governmental organ, the Fifth Circuit reached a conclusion that simply cannot be reconciled with the Second Circuit's decision in this case. For example, Japanese law *requires* Nippon Telephone to provide universal service to all its people. 478 F.3d at 279. Nevertheless, the Fifth Circuit found it was not an organ of government because it also had commercial purposes. *Id.* However, in our case, the Second Circuit

found that the Korea Asset Management Corporation ("KAMCO") was a governmental organ even though it "behaves" like a "typical for-profit corporation" in most respects (App. 9).[8]

The Fifth Circuit further construed the FSIA to subject Nippon Telephone to civil suit even though the Japanese government must approve its board members *and* regulates its distribution of profits. 478 F.3d at 279. The court reasoned that needing governmental authorization in these areas is *not* equivalent to "active supervision" by the government. *Id.*

In sharp contrast, the Second Circuit found that virtually identical indices of governmental oversight defined KAMCO as an organ of the Korean government. And, accordingly, it was insulated from suits by Americans who were harmed by its wrongdoing (App. 40).

The profoundly deepening division in the Circuits lends enormous force to this important issue that is of incalculable national and international consequence. Certainly, under any uniform federal system, the success or failure of a suit, brought by an American citizen who has been injured by a foreign company, cannot be made to depend on whether it is located in the Second, Fifth or Ninth Circuits. Unless mediated by this Court, this languishing conflict over construction of the Foreign Sovereign Immunities Act will become intolerable.

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[8] KAMCO is a joint-stock corporation that has generated annual profits of over $19 million. Its shareholders include a group of private Korean banks (28.6%); the Korea Development Bank (28.6%); and the Korean government (42.8%). (App. 9-10).

This Court has, in extraordinary cases, granted rehearing even though certiorari was originally denied.[9] And, the current case — involving urgent principles of international comity and the vitality of the Foreign Sovereign Immunities Act itself — is equally worthy of that same relief. As emphasized by the Solicitor General, a "closer study" of the case law throughout the nation reveals a "*critical divergence in the manner in which the various circuits apply their seemingly similar tests.*"[10]

We urge, most respectfully, that *now* is the time for this Court to undertake the "closer study" that is so desperately needed to quiet this increasing conflict in the law. And, this case, involving an American citizen and company that were defrauded out of $27 million by a Korean corporation, presents an appropriate platform for this Court's review. Since an acute examination of this issue is essential, the denial of certiorari should be reconsidered to the end that this case be heard.

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[9] *See, e.g., Florida v. Rodriguez*, 461 U.S. 940 (1983); *Black v. United States*, 385 U.S. 26 (1966); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957). This list is, of course, illustrative only and by no means exhaustive.

[10] *See* Solicitor General's Brief as Amicus Curiae at 9, in *Powerex Corp. v. Reliant Energy Services, Inc.*, No. 05-85 (Nov. 14, 2006) (emphasis supplied).

CONCLUSION

The issue presented here is obviously a matter of grave concern, as evidenced by this Court's grant of certiorari in *Powerex*. However, due to procedural problems in *Powerex* this recurring question has been left unresolved. For these reasons, as well as those contained in the petition for a writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

July 20, 2007

Respectfully submitted,

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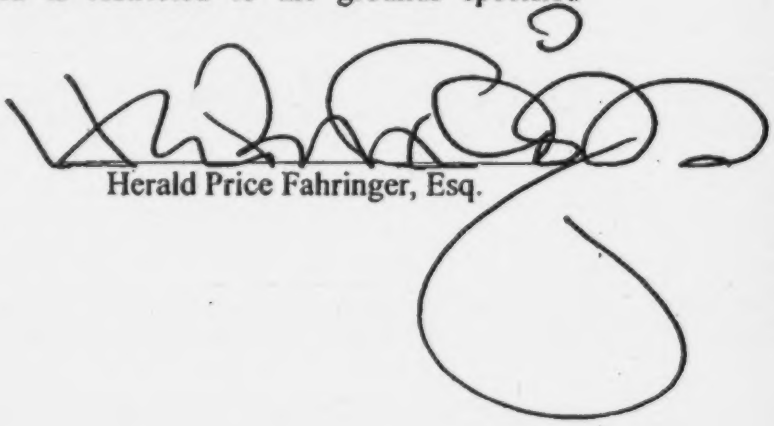
As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



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